(22,094)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 868.

J. HARVEY LADEW, LOUISE BERRY WALL LADEW, INDIVIDUALLY AND AS TRUSTEE UNDER THE WILL OF EDWARD R. LADEW, DECEASED, ET AL., APPELLANTS,

vs.

TENNESSEE COPPER COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 20, 1910.

1 United States Circuit Court for the Eastern District of Tennessee.

In Equity.

J. HARVEY LADEW, LOUISE BERRY WALL LADEW, Individually and as Trustee under the Will of Edward R. Ladew, Deceased; Sadie McN. Wilson, Bruce C. Wilson, Ray G. McN. Wilson, an Infant Suing by Her Next Friend, Bruce C. Wilson, Complainants,

vs.

TENNESSEE COPPER COMPANY, DUCKTOWN SULPHUR, COPPER AND IRON COMPANY (LIMITED), Defendants.

Bill of Complaint.

To the Judges of the Circuit Court of the United States for the Eastern District of Tennessee:

The complainants come and show to the Court that the complainants, J. Harvey Ladew, Louise Berry Wall Ladew and Bruce C. Wilson, are now and were at all the times herein mentioned citizens and residents of the State of New York, and that the complainants, Sadie McN. Wilson and Ray G. McN. Wilson are and were citizens and residents of the State of West Virginia. That said Bruce C. Wilson who sues as next friend of said Ray G. McN. Wilson is the same party above mentioned as complainant herein, and as stated said Bruce C. Wilson is and was a citizen and resident of the State of New York. Further that the Tennessee Copper Company was organized and exists under the laws of the State of New Jersey, but engaged in business in the State of Tennessee, with its

2 main office and place of *that the Tennessee Copper Company was organized and exists under the laws of the State of New Jersey, but engaged in business in the State of Tennessee, with its main office and place of* business in the State of Tennessee, with its main office and place of business in Polk County of said state. Further that the Ducktown Sulphur Copper & Iron Company (Limited) is a corporation of Great Britain, and likewise engaged in business in the State of Tennessee, having its chief office and place of business in Polk County in the State of Tennessee.

Whereupon your orators complain as follows:

(1) Your orators state that the Tennessee Copper Company is a corporation chartered under the laws of the State of New Jersey as aforesaid for the purpose of mining, manufacturing and producing copper and sulphur ores and products in Polk County in the Eastern district of Tennessee, and in the prosecution of its business has and at all times herein mentioned had its main office in said Polk County, Tennessee.

The defendant, Ducktown Sulphur, Copper & Iron Company (Limited), is a corporation organized under the laws of Great Britain

for the purpose of mining, manufacturing and producing sulphur, copper and iron ores and products in Polk County and the Eastern District of Tennessee, and in the prosecution of its business has and at all times herein mentioned had its main office in said Polk County, Tennessee. Said defendant, Ducktown Sulphur, Copper & Iron Company (Limited), had prior to the acts herein complained of filed a duly certified copy of its charter with the Secretary of State of Tennessee, and had applied for and secured a license to locate
3 and carry on business in said state, and under said license and by said authority it has located in the State of Tennessee, and during all the times herein mentioned has carried on its business in the Eastern District in said State of Tennessee.

(2) Your orators state that they are the joint owners in fee and in possession of large tracts of land in the Counties of Fannin, Gilmer and Pickens in the State of Georgia as follows, to-wit:

Purchased from—	Acres.	Lot.	Location— Dist.	Sec.	County.	Bk.	Deed recorded. E.
D. J. Thomas	160	57	10	2	Gilmer	T	101
J. C. Allen (Sarah J. Dever)	160	88	10	2	"	T	104
J. W. Whitner	155	223	7	2	"	T	117
J. W. Whitner	154	211	7	2	"	T	119
	40	185	7	2	"	T	119
	80	184	7	2	"		
J. W. Whitner	160	142	7	2	"	T	124
John H. Underwood & Hannah Underwood	160	82	7	2	"	T	160
	140	100	7	2	"		
Jordan E. Yother	100	100	10	2	"	T	200
	160	177	10	2	"		
	100	136	10	2	"	T	200
	155	137	10	2	"		
Levi M. Greer	160	191	7	2	"	T	216
Jas. N. Patterson	50	19	10	2	"	T	220
Martha M. Price et al	160	173	10	2	"	T	269
Hagerstown Steam Engine & Machine Co.	160	137	7	2	"	T	271
	160	154	7	2	"		
	160	222	7	2	"		
E. H. Watkins	160	171	7	2	"	T	446
Jas. V. Dorsey	135	279	12	2	Pickens	I	108
	90	280	12	2	"		
Alanson McHan	60	316	12	"	"	I	114
	160	143	5	2	"		
	160	144	5	2	"		
	160	145	5	2	"		
John M. Alfred	160	101	13	2	"	I	142

Purchased from—	Acres.	Lot.	Location— Dist.	Sec.	County.	Bk.	Deed recorded. E.
John M. Alfred	160	102	13	2	Pickens	I	142
	160	114	13	2	"		
	160	115	13	2	"		
	40	100	13	2	"		
F. C. Tate	160	53	10	2	Gilmer	T	100
	160	56	10	2	"		
Sam Tate	160	266	12	2	Pickens	I	152
F. C. Tate & W. B. Tate	160	261	12	2	"	I	153
Francas McGaha	150	176	5	2	"	I	162
	40	175	5	2			
J. R. Howell	160	184	5	2	"	I	160
J. B. Tabereaux	160	178	5	2	"	I	161
Thos. W. Pendley	120	188	5	2	"	I	187
	120	224	5	2	"		
Jos. L. Wiggington	160	220	5	2	"	I	184
	80	248	5	2	"		
Cicero Padgett	80	248	5	2	"	I	183
Narcissa J. Padgett	...	248	5	2	"	I	197
W. T. Day	160	185	5	2	"	I	197
Thos. V. Russell	160	107	5	2	Gilmer	T	395
	160	110	5	2	Pickens	I	276
Littleton Haynes by Wilson & Rogers	120	320	12	2	Gilmer	S	631
	160	321	12	2	"		
	10	73	5	2	"		
John H. Rogers by E. R. & J. H. Ladew	Same as above.					U	91
Jesse Mackay by Wilson & Rogers	160	297	12	2	Pickens	H	536
	...	280	12	2	"		
John H. Rogers by E. R. & J. H. Ladew	Same as above.						

(5)* Your orators state that they are the joint owners and in possession of growing trees, timber and timber rights, lumber and lumbering privileges on and in certain other large tracts of land in the counties of Fanning, Gilmer and Pickens in the State of Georgia, as follows, to-wit:

* "5" in original evidently a clerical error—following one is numbered "4"

Purchased from—	Acres.	Lot.	Location— Dist.	Sec.	County.	Bk.	Deed recorded. E.
Laura E. Bates	80	2	7	2	Fannin	M	354
	25	323	8	2	"		
John M. Sharp & Margaret Hallford	120	1	7	2	"	M	353
Samuel Young	80	2	7	2	"	M	355
William Jones	150	324	8	2	"	M	358
W. E. C. Curtis	10	36	7	2	"	M	357
	100	35	7	2	"	M	357
Jas. N. Johnson	70	306	9	2	"	M	374
William N. Johnson	106	289	8	2	"	N	47
	50	288	8	2	"		
D. G. Campbell	80	304	9	2	"	N	43
J. H. Ash	160	310	9	2	"	N	44
	30	309	9	2	"		
Joshua M. Hall	130	309	9	2	"	N	41
	100	16	10	2	Gilmer		
A. Williamson	20	305	9	2	Fannin	N	45
	75	306	9	2	"		
M. B. Williamson, Jr.	400	273	9	2	"	N	48
	...	272	9	2	"		
	...	304	9	2	"		
	...	305	9	2	"		
R. C. McFarland	150	23	7	2	"	N	31

Purchased from—	Acres.	Lot.	Location— Dist.	Sec.	County.	Bk.	Deed recorded. E.
	...	47	7	2	"		
Jas. I. Hall	110	308	9	2	"	N	28
Jas. F. Ledford	135	63	7	2	"	N	37
C. M. Kincaid	30	290	8	2	"	N	38
	160	291	8	2	"		
	30	286	8	2	"		
	30	287	8	2	"		
Thos. P. Jenkins	160	45	7	2	"	N	36
	80	28	7	2	"		
Benj. Seabolt	100	32	7	2	"	N	35
Daniel Carroll & D. B. Carroll	80	34	7	2	"	N	34
John M. Connelly	25	63	7	2	"	N	32
	50	62	7	2	"		
6	125	46	7	2	"		
	55	47	7	2	"		
Mary M. Trammell	42	1	7	2	Fannin	N	29
R. M. Callahan (Mrs.)	90	287	8	2	"	N	40
L. B. Crawford	160	307	9	2	"	N	30
W. F. Gibbs	160	75	6	2	Gilmer	T	208
M. E. Clayton	160	69	6	2	"	T	206
W. A. Whitner	200	35	7	2	"	T	205
	...	38	7	2	"		
	...	71	7	2	"		
John E. Ledford	100	70	7	2	"	T	203
	...	71	7	2	"		
J. F. Harper	960	99	10	2	"	T	202
	...	118	10	2	"		
	...	134	10	2	"		

	...	135	10	2	"		
	...	154	10	2	"		
	...	155	10	2	"		
Jas. M. Thurman	115	35	7	2	"	T	217
	...	36	7	2	"		
Enoch Chancey	150	20	10	2	"	T	219
	10	19	10	2	"		
M. C. Briant	480	94	10	2	"	T	222
	...	123	10	2	"		
	...	129	10	2	"		
Jas. N. Patterson	30	19	10	2	"	T	244
	...	54	10	2	"		
Jas. H. Frady, Levy Key & G. S. Frady	160	93	10	2	"	T	238
J. S. Holt	156	147	7	2	"	T	245
Lavina Patterson	40	38	7	2	"	T	242
Wm. Jones & Sam'l Young	260	18	10	2	"	T	241
Richard C. Ledford	130	75	7	2	"	T	240
Newton Key	40	109	7	2	"	T	237
Thos. H. Key	80	89	10	2	"	T	235
J. E. Harper	80	71	7	2	"	T	374
	20	72	7	2	"		
Joshua M. Hall & Jas. I. Hall	260	17	10	2	"	T	286
W. P. Stone	145	55	10	2	"	T	285
G. W. Watkins & Jno. D. Nelson	160	196	10	2	"	T	284
Sam'l Hollyfield	160	95	10	2	"	T	280
	8	132	10	2	"		
	40	121	10	2	"		
	5	96	10	2	"		
Jeff. M. Turner	100	159	10	2	"	T	276
Thos. C. Johnson	80	49	10	2	"	T	281

Purchased from—	Acres.	Lot.	Location— Dist.	Sec.	County.	Bk.	Deed recorded. E.
Geo. W. Keller	80	124	10	2	"	T	276
Levi Key	80	124	10	2	"	T	283
Clarissa S. Gipson	160	36	7	2	"	T	287
	...	37	7	2	"		
7							
John M. Ward	50	234	10	2	Gilmer	T	277
John B. Johnson	160	59	10	2	"	T	282
A. M. Jones & Harriett Jones	120	166	10	2	"	T	292
H. S. Jones & Harriett Jones	80	241	10	2	"	T	301
	285	264	10	2	"		
	...	265	10	2	"		
	50	240	10	2	"		
Emily J. Chapman	145	90	10	2	"	T	291
E. W. Coleman	160	152	10	2	"	T	270
Jesse H. Harper	160	153	10	2	"	T	274
Joseph Davis	80	136	10	2	"	T	275
T. J. Long	160	248	7	2	"	T	290
	160	249	7	2	"		
M. L. Leatherwood	160	107	7	2	"	T	289
	160	110	7	2	"		
	110	111	7	2	"		
	40	109	7	2	"		
Jeff Leatherwood	160	106	7	2	"	T	288
	50	111	7	2	"		
W. R. Allen	150	54	10	2	"	T	300
Jas. H. Frady & G. S. Frady	80	92	10	2	"	T	303
R. L. Key	80	91	10	2	"	T	304
	40	90	10	2	"		

Isaac S. Holyfield	25	97	10	2	"	T	306
	25	120	10	2	"		
W. H. Pettitt	130	212	7	2	"	T	362
D.A.Smith, W. H. Pettitt & J. F. Harris,Jr.	160	259	7	2	"	T	364
C. W. Whitner	130	176	7	2	"	T	390
	80	185	7	2	"		
D. M. Miller	160	218	7	2	"	T	356
	120	217	7	2	"		
Allen B. Sisson, Jr.	160	96	10	2	"	T	368
	135	97	10	2	"		
	60	121	10	2	"		
Davis C. Parks	160	189	10	2	"	T	377
Peter M. Miller	160	219	7	2	"	T	363
Chas. B. Manning	160	322	12	2	"	T	384
John H. Allen	160	187	7	2	"	T	388
E. D. Stewart	50	181	7	2	"	T	391
	10	198	10	2	"		
W. H. Miller	75	149	7	2	"	T	358
	20	150	7	2	"		
8							
John H. Miller	80	149	7	2	Gilmer	T	357
	20	176	7	2	"		
T. W. Hise	160	251	7	2	"	T	361
Charity Allen	100	213	7	2	"	T	360
Silas Whitaker	40	217	7	2	"	T	392
	40	216	7	2	"		
	80	199	10	2	"		
R. O. Harris	60	222	7	2	"	T	389
J. W. Whitner	40	146	7	2	"	T	367

Purchased from—	Acres.	Lot.	Location— Dist.	Sec.	County.	Bk.	Deed recorded E.
W. A. Carnet & W. A. Whitner	80	143	7	2	"	T	381
Q. R. Reese & Nancy A. Reese	160	291	12	2	"	T	394
	135	290	12	2	"		
Thos. B. Davenport	160	135	7	2	"	T	385
Thos. H. Holyfield	135	120	10	2	"	T	375
J. C. Miller	50	127	10	2	"	T	383
J. S. Smith & Wesley J. Miller	160	144	7	2	"	T	376
Wm. T. Cantrell	110	39	6	2	"	T	386
W. A. Gibson	100	208	10	2	"	T	372
W. H. Searcy	139	215	7	2	"	T	359
	50	214	7	2	"		
J. R. Hill	110	214	7	2	"	T	365
W. T. Wishon	80	79	7	2	"	T	370
D. P. Sisson, Sr.	160	69	7	2	"	T	371
	160	76	7	2	"		
	160	77	7	2	"		
	40	70	7	2	"		
	30	75	7	2	"		
Wm. S. Watkins	145	116	7	2	"	T	380
R. O. Harris	50	212	7	2	"	T	379
	110	222	7	2	"	T	379
J. W. Whitner	40	185	7	2	"	T	119
Jas. N. Patterson	50	19	10	2	"	T	220
Frances McGaha	160	146	5	2	Pickens	I	145
G. W. Fann	160	212	5	2	"	I	163
	160	213	5	2	"		

Thos. W. Pendley	40	188	5	2	"	I	187
	40	224	5	2	"		
	50	223	5	2	"		
John M. Fields	160	210	5	2	"	I	186
	160	211	5	2	"		
	160	222	5	2	"		
	45	223	5	2	"		
W. D. Pendley, Labertha Fields et al	160	283	5	2	"	I	189
W. M. Rackely	160	186	5	2	"	I	185
	80	175	5	2	"		
J. A. Tomberlin	80	316	12	2	"	I	200
9							
Columbus A. Padgett	80	317	5	2	Pickens	I	194
Harrison Pendley	160	294	5	2	"	I	198
Geo. W. Champion & Rebecca Champion	160	149	5	2	"	I	195
	20	176	5	2	"		
Augustus Herron	80	296	12	2	"	I	272
Mary Holbert, M. G. Holbert & E. L. Standfield	160	313	12	2	"	I	274
Jesse Mackay, by Wilson & Rogers	160	297	12	2	"	H	536
	...	280	12	2	"		
John H. Rogers by E. R. & J. H. Ladew	...	Same as above					

10 (4) Your orators show that as set forth in paragraphs 2 and 3, supra, they are the joint owners in fee of more than six thousand acres, and the timber rights in an additional area and territory exceeding 18000 acres; all located in the counties of Gilmer, Fanning and Pickens in the State of Georgia. All of the land aforesaid has been at all times herein mentioned and is now devoted to forestry, and contains in every part and portion thereof forests of chestnut oak, white pine, hickory, poplar, yellow pine, post oak and chestnut, as well as other varieties of trees. The forests aforesaid have been and are being employed by your orator in the production of timber and bark.

Your orators show that the forests and timber and bark interests held and owned by the complainant on the lands hereinabove mentioned are of the most extensive character and of the greatest value. That the supply of lumber, timber and bark furnished and to be secured from said lands is in the absence of the dangers threatened a-d damage done by the defendants as herein set forth, ample to afford a continuous supply of lumber and bark in extremely large quantities for an indefinite period in the future. Said lands contain forests and trees in various stages of maturity. On the same existed and still exist forests and trees that have already matured and reached a development that permits of the cutting and milling of timber and the cutting of bark on a large and profitable scale; other forests and trees on said lands are immature and must be permitted to grow and develop in order to fit them for purposes for which they

11 are owned and held as above set forth. Throughout the holdings of complainant, forests and trees in all stages of growth and development are to be found, and each class requires and receives such attention and treatment as serves not only the present advantage of your orators, but the future needs of forestry and the timber and bark industry.

The plan and policy of the complainants pursued by them in the possession and use of the lands aforesaid have been and are to cut only such trees as have reached a growth of fourteen inches in diameter, or larger, and to leave the younger and smaller trees to mature and supply future wants. By this method the forests contained in the lands of complainants will, if protected from the wrongs herein complained of, never become denuded or destroyed; the condition being that as the old trees and timber are cut away, the younger trees and timber mature more rapidly and in turn become ready for the mill and commerce.

(5) Your orators state that before the commission of the acts herein complained of the forests and timber rights and holdings of the complainants amounted in value to a sum approaching $100,000.00; that the damage heretofore done by defendants to complainants and their interest aforesaid will reach a sum in excess of $50,000.00; so that complainants still own and hold forests and timber interests and rights within the district herein described aggregating in value many thousand dollars.

12 (6) The defendants, Tennessee Copper Company and the Ducktown Sulphur, Copper & Iron Company (Limited), are

now and have been for sometime prior to the filing of this bill engaged in mining, roasting, reducing, smelting, *am*nufacturing and producing sulphur and copper ores and products in Polk County, Tennessee, near the line of the State of Georgia, and within a short distance of the property, lands and forests of these complainants as hereinabove described. Said defendants in the conduct of their said business for the roasting and reduction of copper and sulphur ores, have each recently erected or caused to be constructed, and now own, operate and control a number of furnaces, smelters and ovens, all in close proximity to one another, and upon the lands owned or leased and possessed by the defendants respectively. All of said lands of defendant- are situated in said Polk County in the State of Tennessee, and wholly within the jurisdiction of this honorable Court. Your orators show that by reason of their ownership of the lands and forests aforesaid and appurtenant thereto your orators both in law and in equity are possessed likewise of a right and claim in, to and against the lands and tenements of the defendants in the nature of an easement thereupon that the same shall not be used in a manner to injure or destroy the said lands and forests of your orators adjacent thereto as aforesaid. But the defendants by means of said furnaces, smelters and ovens maintained by them and upon their lands as aforesaid, and in other ways, are, and for some-
13 time past have been generating and causing to be discharged into the atmosphere, vast quantities of smoke, sulphur fumes and noxious and poisonous vapors and gases, and other deleterious substances. Within a short distance from the works and property of the defendants the said smoke, fumes, vapors and gases and other deleterious substances so generated by each respectively inextricably mingle and are together discharged upon the lands and forests and trees of your orators, and as a result thereof great damage has been done and injury is threatened as hereinafter appears.

(7) Said smoke, fumes, gases and vapors have destroyed a considerable portion of the forests and trees owned by and on the land of your orators, and unless relief is granted as herein prayed, the entire holdings of the complainants will be destroyed and their property and interests will be rendered valueless. The smoke, fumes, gases and vapors as aforesaid have descended upon the forests and trees of your orators, and within a short time after such contact the trees are killed and the timber ruined. The destruction aforesaid has included and threatens to include forests and trees of every variety and specie, and in every stage of growth and development.

(8) Your orators show that the zone of destruction created and produced by the defendants is constantly increasing in extent, and the number of forests and trees owned by complainants, and destroyed and threatened with destruction by defendants, is continually growing larger.

Your orators show that the taller trees serve to protect the smaller growth, and have been and are the first to suffer damage and
14 death. Further that forests and trees of the same sort and size are not equally affected, as the same vary in their power

to resist the ruinous effects of the fumes, smoke, gases and vapors aforesaid.

The zone of destruction produced by defendants has increased and is increasing in extent, due to the fact that the death of trees already brought about by the conduct of defendants, permit- the smoke, fumes, gases and vapors aforesaid to travel farther before being absorbed, and in addition the quantity of ores smeltered and handled by the defendants is constantly increasing, so that larger and more ruinous volumes of smoke, fumes, gases and vapors are produced.

(9) Your orators state that the operations of defendants as aforesaid have already destroyed on lands and of the holdings of complainants, forests and timber that would have made good lumber and railroad ties. In addition there have been destroyed trees from which vast amounts of tan-bark could and would have been produced. In addition there have been destroyed under conditions stated trees of younger growth, which were and would be valuable when permitted to mature and reach the size requisite for the cutting of timber and bark.

Your orators show that the death of trees under the circumstances herein set forth, has been and will be so rapid that the timber killed can not be utilized for any purpose of trade or commerce, and have been and will be a total loss to complainants.

Your orators show that they are now threatened with the
15 further death and destruction af the forests and trees remaining upon their lands and that continue to be within the holdings of complainants. That the operations of defendants if permitted to exist as now conducted, and threaten to and will be conducted unless relief herein be granted, will destroy all of the forest, timber and bark rights held and owned by complainants. Further there is threatened with destruction and will be destroyed as aforesaid the younger growth of forests and trees belonging to complainants, and which are of a value impossible to estimate as a source of future supplies for the lumber and tan-bark market.

(10) Your orators further show that the smoke, fumes gases and vapors generated by the defendants and discharged on the property of the complainants destroy in addition to the forests and trees aforesaid, all other forms of plant and tree life, including vegetables, crops, grasses and orchards. That by the destruction of said trees and vegetation the soil loses all moisture and compactness, and has been and will be washed away by the rains. That in such way a portion of the lands of complainants has been rendered unfit for plant and tree life, and unless redress is secured in this action, the remaining part of the lands held by your orators will be rendered bare and barren.

16 (12) Your orators show that the smoke, fumes, gases and vapors produced by defendants and thrown upon and diffused over the property of the complainants, are unwholesome and injurious to the life and health of all persons coming in contact therewith. That said smoke, fumes, gases and vapors poison the atmosphere existing over and upon the premises and property of

the complainants, and render the same unfit for occupation by persons attempting to live or be upon said premises.

Your orators show that much damage has already been done to the complainants through the effect of the aforesaid smoke, fumes, gases and vapors to health of persons coming upon the property of complainants, and that your orators are threatened with further and larger damage from a continuation of the nuisance herein complained of.

(13) Your orators show to the court that for the damage and injuries now threatened to be done to the complainants by the defendants on account of matters hereinbefore set forth, your orators are without remedy in a court of law; and unless relief is granted as herein prayed, your orators will suffer irreparable damage and injury.

Your orators show to the court that it is impossible to estimate or establish the value of the young and immature forests and trees existing in vast abundance on the property of complainants, and held by them under the rights and easements above described. That the purposes for which said forests and trees are held and the conditions surrounding the same are of such character as places beyond the power of any court or person a calculation or approximation
17 of the harm and hurt threatened to be done by the defendants to the complainants. That an injunction to prevent the perpetration of said wrongs is the only adequate relief that complainant can secure.

(14) Your orators state that the attention of the defendants has frequently been called to the damage done and threatened to be done the complainants, and demand has repeatedly been made that they abate the nuisance of which they have been and are guilty. The State of Georgia has investigated conditions existing at and on the premises and property of these complainants, and has inquired into the injury being done to complainants, and as a result of such investigation and inquiry, said State of Georgia made demand on said defendants for an abatement of the nuisance herein sought to be enjoined.

Your orators show that the defendants have not in any way respected the demand aforesaid, but on the contrary, have enlarged their operations, and increased the smoke, fumes, vapors and gases generated by them and thrown by them on the property and premises of the complainants; in consequence of which the damage and injury done and threatened to be done complainant- has constantly increased and is constantly increasing.

(15) Your orators further show that the aforesaid conditions existing at and on the property and premises of the complainant- have been investigated by the Bureau of Forestry of the United States, and by report of said Bureau the injury done and threatened to be done complainant- as herein set forth was established. That said report was communicated to the defendants, but no effort was
18 or has been made to correct said conditions, or save complainants from the ruinous consequences thereof. On the contrary, additional and enlarged injuries have been visited by the de-

fendants upon the complainants, and yet larger damage is threatened for the future.

(16) In consideration whereof, and for as much as your orators are remediless in the premises, and can have no adequate relief except in this court; and to the end, therefore, that the defendants may, if they can, show why your orators should not have the relief prayed, and to the end that defendants may make full, true and direct answer to the matters hereinbefore stated and charged, but not under oath, answer under oath being expressly waived, and to the end that the right and claim of your orators as aforesaid to and upon said properties of the defendants, that the same shall not be used by them in a manner to destroy or injure the lands and forests of your orators, may be declared and enforced, and that the nuisance now maintained as aforesaid upon the said properties of the defendants may be abated by and under the direction of this Honorable Court, through its own officers or otherwise as it shall seem suitable and right; and that such changes shall be made by and under its direction in and to the properties of the defendants as shall prevent the discharge therefrom upon the lands and forests of your orators of the poisonous smoke, gases, vaopor and other deleterious substances hereinbefore complained of; and to the end that the defendants and each of them, their officers, servants and employees may be restrained by injunction issuing out of this court from doing, causing, directing, or in any manner
19 aiding or abetting the acts hereinbefore complained of, or their continuance; your orators pray that Your Honors may grant a writ of injunction properly restraining and enjoining the defendants and each of them, their officers, agents, servants and employees from maintaining, operating, directing or permitting upon their land or premises the operation or maintenance of any oven, roast heap, pit, furnace or appliance generating or giving forth any of the smoke, gases, fumes or vapors hereinbefore complained of, or otherwise generating, producing or causing any foul or dense or copper or sulphurous smoke, or any noxious, poisonous, unhealthy or disagreeable, or in any manner injurious vapor, gas, fume or odor upon the territory or lands of your orators.

Your orators further pray that your Honors grant unto your orators a writ of injunction commanding the said defendants, The Ducktown Sulphur, Copper & Iron Company (Limited) and the Tennessee Copper Company, and each of them, their agents, servants, employees and confederates, and all persons acting under their authority or control or direction, or under the direction, authority or control of either of them, to absolutely desist and refrain from using, managing, maintaining, or in any manner operating any furnace, pit, oven or other appliance or copper reducing method causing, generating, giving off or discharging any dense or foul smoke, or poisonous, noxious, unwholesome or unpleasant gas, vapor, odor or fume, and from the diffusing of any foul or dense smoke, or poisonous, noxious, unwholesome or unpleasant gas, vapor, ordor or fume upon the territory or lands of your orators, or from the generating, causing or diffusing any foul or dense smoke or any gas, vapor, odor or fume, damaging or destroying or injuring the property of your
20 orators or causing or producing any physical or bodily harm, injury, discomfort, inconvenience to persons on or near the

property and premises of your orators or depriving your orators of pure air and sunlight, until such time as your Honors shall direct herein; and that upon the hearing hereof the writ herein prayed for be made and confirmed until the final determination of this suit, and that thereupon the injunction herein be made perpetual.

Your orators further pray for such other and further relief herein as may to the court seem meet and proper.

May it please your Honors to grant unto your orators, not only a writ of injunction conformable with the prayer of this bill, but a writ of subpœna issuing out of and under the seal of this Honorable Court directed to the defendants, The Tennessee Copper Company and The Ducktown Sulphur, Copper and Iron Company (Limited), their officers, trustees and agents, commanding them and each of them, under a certain penalty to be therein inserted, on a day certain to be and appear and answer (but not under oath) to this bill of complaint, and to further stand to and abide such orders and decree as shall be made here agreeable to equity and good conscience, and your orators will ever pray.

H. B. CLOSSON,
52 William St., N. Y.,
CHARLES H. SHIELD,
BENJAMIN F. WASHER,
Louisville, Ky.,
Of Counsel for Complainants.

CHARLES SEYMOUR,
Knoxville, Tenn.,
Solicitor for Complainants.

21 UNITED STATES OF AMERICA,
Southern District of New York,
County of New York, ss:

J. Harvey Ladew being duly sworn says I am one of the complainants named in the foregoing Bill. I have read the foregoing Bill. The matters therein alleged are true to the best of my knowledge, information and belief.

J. H. LADEW.

Sworn to before me this 7th day of May, 1908.

[Seal Andrew Woelfel, Notary Public, Richmond County.]

ANDREW WOELFEL,
Notary Public, Richmond County.

Certified in N. Y. Co.

(Endorsed:) #1012—J. H. Ladew et als. vs. Tenn. Copper Co. et al. Bill of complaint—Filed May 25/08—R. M. Watkins, D. C.

22 **No. 1012.**

J. HARVEY LADEW et al.
vs.
TENNESSEE COPPER COMPANY, DUCKTOWN SULPHUR, COPPER & IRON CO., LTD.

In this cause upon application of complainants made before the Hon. E. T. Sanford Judge at the time of hearing of motions of defendants to dismiss original bill for want of jurisdiction, Complainants were allowed to amend their bill by inserting the following at the end of Clause XIII of the Original Bill.

Complainants further charge that the plants properties and operations of each defendant constituting the nuisances here sought to be abated are of greater value than Five Thousand Dollars and that the damage done complainants' lands as aforesaid by the Ducktown Sulphur Copper & Iron Company Limited for which complainants seek redress exceeds the amount of Five Thousand Dollars and that the injury which will be done to complainants' lands by the Ducktown Sulphur Copper and Iron Company unless the nuisance complained of be abated exceeds in value the amount of Five Thousand Dollars.

That the damage done as aforesaid to complainants' lands by the Tennessee Copper Company exceeds the amount of Five Thousand Dollars and that the injury which will be done to complainants' lands by the Tennessee Copper Company unless the nuisance complained of be abated exceeds in value the amount of Five Thousand Dollars.

And that the matter in controversy herein exclusive of interest and costs exceeds the said sum of Five Thousand Dollars.

Said amendment will be made by the entry of record of this order and without the issuance of further process.

Saturday, Dec. 19, '08, at Knoxville.

Presented by N. B. Morrell in open court and allowed and filed with brief with the Deputy Clerk.

23 UNITED STATES OF AMERICA,
Southern Division of the Eastern
District of Tennessee:

The President of the United States of America to the Marshal of the Eastern District of Tennessee, Greeting:

You are hereby commanded to summon Tennessee Copper Company — Ducktown Sulphur, Copper & Iron Co. if to be found in your District, to be and appear in the Circuit Court of the United States for the Eastern District of Tennessee, aforesaid, at Chattanooga, on the first Monday in July next, to answer a certain bill in Chancery, filed and exhibited in said Court against them by J. Harvey Ladew, Louise Berry Wall Ladew, Sadie McN. Wilson, Bruce C. Wilson and Ray G. McN. Wilson. Hereof you are not to fail under penalty of the law thence ensuing: And have you then and there this writ.

Witness the Honorable Melville W. Fuller Chief Justice of the

United States this 25th day of May A. D. 1908 and the 132 year of the Independence of the United States of America.

Attest:

R. M. WATKINS,
Deputy Clerk.

MEMORANDUM.—The said defendants are required to enter their appearance in this suit in the Clerk's Office of said Court on or before the first Monday of July 1908 otherwise the said bill may be taken pro confesso.

R. M. WATKINS,
Deputy Clerk.

Received at Athens June 3, 1908 Served June 4, 1908 by leaving a certified copy of the within writ with B. B. Gottsberger General Manager of Tennessee Copper Co. at Copper Hill, Polk Co. Tennessee he being the highest official of said Company to be found in my District Served June 5, 1908 As to Ducktown Sulphur Copper & Iron Co. by leaving a certified copy of the within with C. W. Redwick Acting Gen'l M'g'r Ducktown Sulphur Copper & Iron Co. at Isabella, Polk Co. Tenn. he being the highest official of said D. S. C. & I. Co. to be found in my District. This June 5, 1908.

S. O. WELCH,
Dep. M'ch'l.

Endorsed: No. 1012—J. Harvey Ladew et als. vs. Tenn. Copper Co. Filed June 10 1908 R. M. Watkins—Dep. Clerk Chancery Subpœna Issued May 25, 1908 R. M. Watkins—Dep. Clerk Polk County.

24 In the Circuit Court of the United States for the Eastern District of Tennessee, Southern Division.

No. 1012. In Equity.

J. HARVEY LADEW et al.
vs.
TENNESSEE COPPER CO. et al.

Special Appearance of Tennessee Copper Company.

Now comes the defendant, Tennessee Copper Company, by its counsel and enters its appearance herein under protest for the special and single purpose of objecting to the jurisdiction of this Court and for no other purpose.

CORNICK, WRIGHT & FRANTZ,
Attorneys for Defendant Tennessee Copper Company.

This June 30, 1908.

(Endorsed:) Filed July 6, 1908. R. M. Watkins, D. C.

In the Circuit Court of the United States for the Eastern District of Tennessee, Southern Division.

No. 1012. In Equity.

J. HARVEY LADEW et al.
vs.
TENNESSEE COPPER COMPANY & DUCKTOWN SULPHUR, COPPER & IRON CO., LTD.

Motion to Dismiss.

Comes the Tennessee Copper Company, one of the above named defendants, which has entered its special appearance herein under protest, for the special and single purpose of objecting to the jurisdiction of this court and for no other purpose, and moves the Court to dismiss the bill filed in this cause on May 25th, 1908, for the following reasons:

I.

Because it appears upon the face of said bill, that the complainants, J. Harvey Ladew, Louise Berry Wall Ladew and Bruce C. Wilson are now and were at the time of the filing of said bill, citizens and residents of the State of New York, and that the complainants, Sadie McN. Wilson and Ray G. McN. Wilson are now and were at the time of the filing of said bill, citizens and residents of the State of West Virginia, and that none of said complainants was or is a citizen or resident of the Eastern District of Tennessee, and further it appears upon the face of said bill that this defendant, Tennessee Copper Company, is now and was at the time of the filing of said bill, a citizen and resident of the State of New Jersey and was
26 not and is not a citizen or resident of the Eastern District of Tennessee, while the suit herein is brought in the Eastern District of Tennessee, Southern Division. Wherefore it appears upon the face of said bill that this Court has no jurisdiction of the parties to this suit under the Act of Congress conferring jurisdiction upon the Circuit Courts of the United States, which Act contains the following provisions, to-wit:

"No civil suit shall be brought before either of said Courts (Circuit Court or District Court) against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the District of the residence of either the plaintiff or the defendant."

Wherefore and for which reasons appearing upon the face of the complainants' bill, this defendant moves that this suit be dismissed as to this defendant.

TENNESSEE COPPER COMPANY,
By CORNICK, WRIGHT & FRANTZ, *Att'ys.*

CORNICK, WRIGHT & FRANTZ, *Att'ys.*

(Endorsed:) Filed July 6, 1908. R. M. Watkins, D. C.

27 In the Circuit Court of the United States for the Eastern District of Tennessee, Southern Division.

No. 1012. In Equity.

J. HARVEY LADEW et al.
vs.
TENNESSEE COPPER CO. et al.

Special Appearance of the Ducktown Sulphur, Copper & Iron Company, Limited.

Comes the defendant, Ducktown Sulphur, Copper & Iron Company, Limited, by its attorney and solicitor and enters its appearance for the special purpose of entering a motion to dismiss complainants' bill for want of jurisdiction, as appears from the face of the bill, and for misjoinder of the parties defendant, but for no other purpose.

DUCKTOWN SULPHUR, COPPER & IRON CO., LTD.,
By JAS. G. PARKS, *Attorney & Solicitor.*

This, July 6th, 1908.

28 In the Circuit Court of the United States for the Eastern District of Tennessee, Southern Division.

No. 1012. In Equity.

J. HARVEY LADEW et al.
vs.
TENNESSEE COPPER COMPANY and DUCKTOWN SULPHUR, COPPER & IRON COMPANY, LIMITED.

Motion to Dismiss.

The Ducktown Sulphur, Copper & Iron Company, Limited, one of the defendants in the above-styled cause, which has entered its special appearance under protest and only for the purposes of this motion, and for no other, now comes and moves the Court to dismiss the bill filed in said cause, and assigns the following reasons:

1.

Because it appears from the face of the bill that it was filed only for the purpose of abating or enjoining an alleged nuisance affecting only lands lying wholly within the State of Georgia, no right, title, interest, or claim whatever of the complainants within the Eastern District of Tennessee being in any way involved.

Wherefore, it appears from the face of the bill that this Court has no jurisdiction of the subject-matter of this suit.

2.

Because, although the bill shows that the defendants are separate and independent concerns, each conducting its own operations in its own way, they are jointly sued.

Wherefore, this defendant says that it is misjoined with its
28a co-defendant; (1) because, under the facts averred and under the common law, a joint action cannot be maintained; (2) because it appears that its co-defendant (being a resident of New Jersey) is not suable in this Court and that this defendant is an alien; whereas, in a joint action, like this, it must appear that both defendants are competent to be sued.

3.

Because the bill (paragraph 5) avers that the value of the lands and "timber rights" claimed by the complainants is $2,000 and over; but it does not aver that the "threatened" injury by this, or either, or both of the defendants will amount to this.

Wherefore, this defendant says that if this suit is sought to be maintained as a joint suit against both defendants (as shown by the bill), it should be averred that the "threatened" injury from the operations of both of the defendants will amount to $2,000 or more; and that if not maintainable as a joint suit, it cannot be maintained against either of the defendants without an averment in the bill showing that the operations of this particular defendant will do, or that they threaten to do, injury to the jurisdictional amount. And, therefore, this defendant says that this cannot be maintained as a joint suit, for the reason set out in paragraph 2 of this motion; and that if it be sought to maintain it as a separate action, it cannot be done, because the bill nowhere avers or shows "threatened" injury from the operations of this defendant meet, or approximate, the amount required to maintain jurisdiction in this Court.

Wherefore, and for the said reasons appearing upon the face of the bill, it is moved that the bill be dismissed as to this defendant.

DUCKTOWN SULPHUR, COPPER & IRON COMPANY, LTD.,
By JAS. G. PARKS, *Attorney & Solicitor.*

Filed July 6, '08.

29 No. 1012.

J. HARVEY LADEW et al.
vs.
TENNESSEE COPPER COMPANY, DUCKTOWN SULPHUR, COPPER & IRON CO.

In this cause upon application of complainants made before the Hon. E. T. Sanford Judge at the time of hearing of motions of defendants to dismiss original bill for want of jurisdiction, Complainants were allowed to amend their bill by inserting the following at the end of Clause XIII of the Original Bill.

Complainants further charge that the plants properties and operations of each defendant constituting the nuisance here sought to be abated are of greater value than Five Thousand Dollars and that the damage done Complainants' lands as aforesaid by the Ducktown Sulphur Copper & Iron Co., Limited for which complainants seek redress exceeds the amount of Five Thousand Dollaes and that the injury which will be done to complainants' lands by the Ducktown Sulphur Copper & Iron Co. unless the nuisance complained of be abated exceeds in value the amount of Five Thousand Dollars.

That the damage done as aforesaid to complainants' lands by the Tennessee Copper Co. exceeds the amount of Five Thousand Dollars and that the injury which will — done to complainants' lands by the Tennessee Copper Co. unless the nuisance complained of be abated exceeds in value the amount of Five Thousand Dollars.

And that the matter in controversy herein exclusive of interests and costs exceeds the said sum of Five Thousand Dollars.

Said amendment will be made by the entry of record of this order and without the issuance of further process.

Enter.

SANFORD, *J.*

O. K.
CORNICH,
WRIGHT,
Sol's for Def't Tenn. Copper Co.

Endorsed: No. 1012. The U. S. Circuit Court. J. Harvey Ladew, et al. vs. Tennessee Copper Co. et al. Ordet to Amend Bill of Compl'ts. Filed Dec. 19, 1908—D. L. Snodgrass, Clerk.

30 In the United States Circuit Court, at Chattanooga.

No. 1012. In Equity.

J. HARVEY LADEW et al.
v.
TENNESSEE COPPER CO. et al.

Opinion on the Defendant's Motion to Dismiss the Bill.

This bill was filed by the complainants, citizens and residents of the States of New York and West Virginia, against the Tennessee Copper Company, a corporation of the State of New Jersey, and the Ducktown Sulphur, Copper & Iron Company, Ltd., a corporation of the Kingdom of Great Britain, each having its main office and business in Polk County, Tennessee, within this judicial district.

The bill alleges that the complainants are the joint owners of certain tracts of forest lands and timber rights in the State of Georgia, containing altogether twenty four thousand acres and timber aggregating in value many thousands of dollars; that the defendants are engaged in mining and manufacturing sulphur and copper ores in Polk County, Tennessee, near the Georgia State line, within a short

distance, of complainants' property, and have erected and are operating furnaces, smelters and ovens for roasting and reducing such ores, in close proximity to one another, upon lands in Polk County, Tennessee, owned or leased by them, respectively; that "by reason of their ownership of the lands and forests aforesaid," complainants "both in law and equity are possessed of a right and claim in, to and against the lands and tenements of the defendants in the nature of an easement thereupon that same shall not be used in a manner to
31 injure or destroy the said lands and forests of your orators adjacent thereto as aforesaid;" that the defendants by means of said furnaces, smelters and ovens, and in other ways, generate vast quantities of smoke and fumes, which inextricably mingle a short distance from their works and are together discharged upon complainants' lands and forests, and have destroyed much of complainants' forests and inflicted great damage; that the zone of destruction is constantly increasing, and the defendants' operations, if permitted to continue, will destroy all of complainants' forests and timber and other forms of plant and tree life, and render their lands barren, unfit for occupation, and valueless; that it is impossible to calculate or approximate the damage threatened, and the complainants are without remedy in a court of law, and unless relief is granted, will suffer irreparable injury; and that "an injunction to prevent the perpetation of said wrongs is the only adequate relief that complainants can secure."

And "to the end that" the aforesaid right and claim of complainants to and upon the properties of the defendants, that the same shall not be used in a manner to destroy or injure the lands and forests of complainants, may be declared and enforced, and that the nuisance maintained upon said properties may be abated by and under the direction of the court, through its own officers or otherwise, and that such changes be made by and under its direction in and to the defendants' properties as shall prevent the discharge therefrom upon complainants' lands and forests of the aforesaid deleterious substances, and that the defendants may be restrained by injunction from doing or causing the acts complained of, or the continuance, the complainants pray; that writs of injunction be granted restraining and enjoining the defendants, their officers, agents and servants, from maintaining or operating upon their premises any oven, furnace or
appliance giving forth any of the smoke and fumes com-
32 plained of, or otherwise producing or causing any noxious or injurious smoke or fumes upon the complainants' lands, and commanding them to desist and refrain from using, maintaining or operating any furnace or other appliance or copper reducing method giving off or discharging any noxious smoke or fumes upon the complainants' lands; and they further pray for general relief.

By an amendment to the bill, made by leave of the court, complainants further allege that the properties and operations of each defendant constituting the nuisance sought to be abated are of greater value than $5,000.00; that the injury which will be done to complainants' lands by each of the defendants unless the nuisance is

abated exceeds in value $5,000.00: and that the matter in controversy, exclusive of interest and costs, exceeds $5,000.00.

Subpœnas to answer were issued, as prayed in the bill, and served upon the highest officer of each of the defendants to be found within this district.

Motion of the Tennessee Copper Company.

The Tennessee Copper Company, having entered a special appearance for the sole purpose of objecting to the jurisdiction of the court, moved to dismiss the bill on the ground that as it appears upon its face that the complainants are citizens and residents of New York and West Virginia and said defendant a citizen and resident of New Jersey, and that neither the complainants nor said defendant are citizens and residents of the eastern district of Tennessee, this Court has no jurisdiction.

33 It is well settled that a want of jurisdiction apparent on the face of the bill may be taken advantage of by motion to dismiss. Coal Co. v. Blatchford, 11 Wall. 172; Central Trust Co. v. McGeorge, 151 U. S. 129, 132; Connor v. Vicksburg & M. R. Co., (C. C.) 36 Fed. 273; Municipal Inv. Co. v. Gardiner, (C. C.) 62 Fed. 954; Stichtenoth v. Central Exchange, (C. C.) 99 Fed. 1.

It is also clear, as is conceded by the complainants, that as the Act of March 3, 1875, Ch. 137, Sec. 1, as amended by the Act of August 13, 1888, Ch. 866, Sec. 1, 25 Stat. 433, provides that when the jurisdiction of the Circuit Court is founded only on the fact that the parties are citizens of different States, suit shall be brought only in the district where either the plaintiff or the defendant resides, and as neither the complainant nor the Tennessee Copper Company, a New Jersey corporation, are residents of this district, if jurisdiction of this case depends upon diverse citizenship alone, the Circuit Court of this particular district is without jurisdiction, and such want of local jurisdiction not having been waived by said defendant, the suit as to it must be dismissed. Shaw v. Quincy Min. Co., 145 U. S. 444; Southern Pac. Co. v. Denton, 146 U. S. 202; In re Keasbey & Mattison Co., 160 U. S. 221; Western Loan Co. v. Mining Co., 211 U. S. 368.

The complainants contend, however, that jurisdiction of this suit does not depend upon diverse citizenship alone, but that it is an action relating to property which may be brought against said defendant in this district under Section 8 of the Act of March 3, 1875, Ch. 137, 18 Stat. 470, which provides that "when in any suit commenced in any Circuit Court of the United States to enforce any legal or equitable lien upon, or claim to, or to remove any
34 incumbrance or lien or cloud upon the title to real and personal property within the district where such suit is brought," any of the defendants shall not be an inhabitant of, or found within said district, or voluntarily appear, an order directing such absent defendant to appear and make defense may be served on him personally wherever found, or when this is impracticable, by publication, and that in default of such appearance, the court may "enter-

tain jurisdiction, and proceed to the hearing and adjudication of such suit . . .; but said adjudication shall, as regards said absent defendant . . . without apperaance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district."

This section of the Act of 1875 was not repealed by the Act of 1888, and remains in full force. Mellen v. Moline Works, 131 U. S. 352; Tellenik v. Huron Copper Co., 177 U. S. 11); Citizens Savings Co. v. Ill. C. R. Co., 205 U. S. 46, 54. And when the requisite diversity of citizenship exists to give the Circuit Court jurisdiction a suit embraced within the provisions of this section may be brought within the district in which the property is situated, although neither the plaintiff nor defendant is a resident of such district. Greely v. Lowe, 155 U. S. 58; Citizens Savings Co. v. Ill. C. R. Co., *supra*, Single v. Paper Mfg. Co., (C. C.) 55 Fed. 553; Spencer v. Stock-Yarks Co. (C. C.) 56 Fed. 741.

The present suit does not, however, in my opinion come within the provisions of section 8 of the Act of 1875.

I. It clearly cannot be held to be within the provisions of this section under the broad theory upon which complainants rely that it is purely a local action *in rem* to abate a nuisance, wherein relief may be given without a judgment *in personam* against the defendants, through process of the court executed by its officers and operating directly on the *res*, and hence as such local action *in rem*, necessarily included within the provisions of said section 8.

In the first place, as the bill does not allege that either of the plants of the defendants, or any particular strictures or appliances therein, constitutes a nuisance *per se*, which should be abated or destroyed under process of the court, but, in effect, merely complains generally of an unlawful use of the defendants' properties by methods of operating their plants which generate and diffuse noxious fumes and smoke over the complainants' properties, and, while it contains an incidental reference to an abatement of the nuisance by officers of the court, on the other hand avers specifically that an injunction to prevent the perpetration of the wrongs is the only adequate relief that complainants can secure, and prays for no specific relief other than an injunction operating upon the defendants *in personam* and restraining them from an improper use of their property, the suit, evidently, is not, under the pleadings, purely an action *in rem* to abate a nuisance, but is, on the contrary, primarily and essentially an action to restrain a nuisance by injunctive relief operating *in personam* upon the defendants. Thus considered, it would follow that if the doctrine of York County Sav. Bank v. Abbot, (C. C.) 139 Fed. 988, 994 a case upon which complainants rely—that no jurisdiction is conferred upon the Circuit Court under section 8 of the Act of 1875 in an action where complete relief cannot be given according to the terms of the bill without a judgment in personam against an absent defendant, be correct, the court would clearly be without jurisdiction of the case.

And if jurisdiction under section 8 of the Act depended upon whether the proceedings were essentially *in rem* or *in personam*, it

might well be doubted whether the specific prayer for injunctive relief against the defendants could be disregarded, and the bill treated for jurisdictional purposes, under its broad averments and prayer
36 for general relief, as merely one to abate a nuisance by process operating *in rem*, as distinguished from a suit to retstrain the nuisance by process *in personam*. (See Mississippi & M. R. R. Co. v. Ward, 2 Black, 485 Van Betgen v. Van Bergen, 2 Johns. Ch. 272; Carlisle v. Cooper, 18 N. J. Eq., 241; Ramsay v. Chandler, 3 Col. 90 Lassater v. Garrett, 4 Baxt. (Tenn.) 369; 1 Am. & Eng. Enc. of Law, 2nd Ed. 64; 29 Cyc., 1209, 1252; 14 Enc. Pl. & Pr. 1146, 1147).

It is, however, unnecessary to determine this question, since even if the suit could thus be considered, in the aspect most favorable to the complainants, as an action to abate a nuisance under direct process of the court, and hence as purely a local action *in rem*, or in the nature of a proceeding *in rem*, this would not suffice to bring it within the provisions of section 8 of the Act of 1875.

It is clear that this section does not extend either to all suits of a local nature or to all local actions *in rem* or in the nature of proceedings *in rem*, but is definitely limited to suits brought for the enforcement of certain specific rights. The suits which it includes are not described by reference to their general character, but by reference to their object. It contains no general descriptive phrase, such as "suits of a local nature," used in sections 741 and 742 of the Revised Statutes in regard to suits brought in a State having more than one judicial district, or "proceedings *in rem*," or other like phrase; on the contrary it definitely enumerates the suits to which it relates, namely, those brought "to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property." In view of this specific enumeration of the suits to which it relates, and the absence of any general phrase extending its provisions to any other actions, local or otherwise, its scope cannot be extended by any process of construction, there being nothing in its language
37 upon which such extension can be based.

Where a "statute specifies certain classes of cases which may be brought against non-residents, such specification doubtless operates as a restriction and limitation upon the power of the court." Roller v. Holly, 176 U. S. 398, 406.

2. The question then arises whether, as the complainants further contend, this suit comes within the specific provisions of section 8 of the Act of 1875, as a suit brought to enforce a "claim to . . . property" of the defendants, within the meaning of this section, there being obviously no other class of suits enumerated in this section in which it can be included.

This suit clearly does not come within this provision merely because the complainants allege in their bill that by reason of the ownership of their lands they are "possessed of a right and claim in, to and against the lands and tenements of the defendants in the nature of an easement thereupon," this being the mere assertion of the legal conclusion which the complainants seek to draw from the fact of their ownership of the lands in Georgia; and it cannot be

held to come within this provision unless, upon the facts alleged in the bill, the complainants are seeking to enforce a right which, within the meaning of the Act may properly be termed a "claim to the property" within this district.

The theory of the complainants is, that attached to all property is a claim, based upon natural right, held by those who occupy any relation with respect thereto, that it shall not be used in such way as to injure or damage such other persons; and that the duty under which the defendants' property rests creates in favor of the complainants a right to and a claim against such property, which "may be called a negative right or easement upon land based upon the maxim of *sic utere tuo ut alienum non lædas*," and is the basis of the present action.

38 There appears to be no direct adjudication upon the question whether a claim of this character may be properly considered a claim to property within the meaning of the statute.

The statement in Shainwald v. Lewis, (D. C.) 5 Fed. 310 317, that by the words "legal or equitable lien or claim against real or personal property," Congress "intended to reach every case in which there should be any sort of charge upon a specific piece of property, capable of being enforced by a court of equity," which is cited in 1 Rose's Code, Fed. Proc., sec. 856, note C, as authority for a similar statement, was purely *obiter*, the only point involved in the case being that Rev. Stat. sec. 738, in which these words originally occurred, did not apply to a suit in which the plaintiff sought to subject the general property of the defendant to the payment of its debts, but only to suits to enforce some pre-existing lien or claim upon a specific piece of property. Neither is the question controlled by the definition of the word "claim" given by Mr. Justice Story in Prigg v. Pennsylvania, 16 Pet. 536, 615, as "a demand of some matter as of right, made by one person upon another, to do or forbear to do some act or thing as a matter of duty," this definition being given in a case involving the construction of a statute providing that slaves should be delivered up "on claim of the party" to whom their service was due; the meaning of the word "claim" as used in a statute of this character in reference to the "claim of" one person upon another to do a certain thing, being manifestly different from its meaning as used in the Act of 1875 in reference to the claim of one person "to the property of another. Evidently its meaning as used in the Act of 1875 in the phrase a "claim to . . . property," is much more nearly expressed by the next definition cited by Mr. Justice Story in this same opinion, as given by Lord Dyer in Stowel v. Zouch, 1 Plowd. 359, that "a claim is a

39 challenge by a man of the propriety or ownership of a thing, which he has not in possession, but which is wrongfully detained from him."

On the whole I am of the opinion, that as it appears from the concluding portion of this section that it relates entirely to suits of which property is the "subject," and as the words "claim to . . . property" are evidently used in contrast to liens or incumbrances upon property and are the only words in the section under which

a claim to the direct ownership of property may be included, these words relate only to claims made to the property in the nature of an assertion of ownership or proprietary interest, or other direct right or claim to the property itself, such, for example, as the claim of ownership of an undivided interest in the property upon which a suit for partition may be based. (Greely v. Lowe, 155 U. S. 58, 74) and do not include the *in*sertion of a right which is not based upon an interest in the property itself, but seeks merely to enforce a restriction which the law imposes upon the owner of the property in reference to its proper use; and therefore, that a bill to abate or restrain a nuisance is not a suit to enforce a claim to the defendant's property within the meaning of the statute.

"A nuisance is literally an annoyance and signifies in law such a use of property or such a course of conduct as . . . transgresses the just restrictions upon use or conduct which the proximity of other persons or property in civilized communities imposes upon what would otherwise be rightful freedom." 21 A. & Eng. Enc. of Law, 2nd Ed. 682. The right to have a nuisance on another's property restrained or abated is not based upon an assertion of title to such property, or of any proprietary interest therein, or right or claim to the property itself, but is, on the contrary, based solely upon the breach of a personal duty which the owner of the property owes to his neighbor in its management and use; breach of duty which may be punished by indictment where the nuisance is of a public character, and which renders the offender personally liable in damages to the injured neighbor. And therefore the assertion by the neighbor of his right to have the nuisance restrained or abated, being based on the personal wrong and breach of duty on the part of the owner, and seeking merely to enforce the just restriction which the law imposes upon him in the use of his property and prevent misuse, cannot, in my opinion, be regarded in any just sense as the assertion on the part of the neighbor of a claim to the property itself within the meaning of the statute.

Nor can this result be changed by reason of the fact that as a suit for the abatement of a nuisance is a local action which can only be brought in the district where the nuisance is located, (Mississippi & M. R. R. Co. v. Ward, *supra*), in such a suit between citizens of different States, where neither of the parties reside in the district where the nuisance is located, the action not being maintainable under section 8 of the Act of 1875, there is no jurisdiction in any Circuit Court of the United States except upon a waiver by the defendant of the want of jurisdiction in the particular district.

The construction and interpretation of statutes cannot extend to amendment or legislation. United States v. Fox, 3 Wall. 445, 448; Petri v. Creelman Lumber Co., 199 U. S. 487, 495. Nor can considerations of apparent hardship justify a strained construction of the law as written. Jos. Schlitz Brewing Co. v. United States, 181 U. S. 584, 589; St. Louis & I. M. R. Co. v. Taylor, 210 U. S. 281. "The remedy," if any be required, "is in Congress." Ex parte Girard, 3 Wall., Jr., 265, 10 Fed. Cas. 436.

Furthermore the complainants are not on that account remediless;

since in this case, as well as in the many other controversies between citizens of different States which Congress has not deemed
41 proper to include within the jurisdiction of the Circuit Courts of the United States, the parties may always rely for the enforcement of their rights upon the State courts having the necessary local jurisdiction.

It results, therefore, that the motion of the Tennessee Copper Company must be granted and the bill dismissed as to it, for want of jurisdiction over the person of the defendant; but without prejudice. Mason Grocery Co. v. Atlantic C. L. R. Co. U. S. Sup. Ct., January 17, 1910, York County Sav. Bank; *York County Sav. Bank* v. Abbot, (C. C.) 139 Fed. 988. And without the adjudication of costs. The Mayor v. Cooper, 6 Wall. 247; Hornthall v. The Collector, 9 Wall. 560; Mansfield C. & L. M. Ry. v. Swann, 111 U. S. 379; York County Sav. Bank v. Abbot, *supra.*

Motion of the Ducktown Sulphur Copper & Iron Company.

The Ducktown Sulphur, Copper & Iron Company, hereinafter called the Ducktown Company, having also entered a special appearance, moved to dismiss the complainants' bill for want of jurisdiction and misjoinder of the parties defendant.

It is well settled, and is not disputed, that the requirement of section 1 of the Act of 1875, as amended by the Act of 1888, that suits in a Circuit Court based upon diverse citizenship alone shall be brought within a district in which either the plaintiff or the defendant resides, has no application to suits brought against aliens, and that if jurisdiction otherwise exists in the Circuit Court, an alien corporation may be sued in any district in which valid service may be made upon it. In re Hohorst, 150 U. S. 653; Barrow Steamship Co. v. Kane, 170 U. S. 100.

The Ducktown Company urges, however, that there is nevertheless a want of jurisdiction in this Court and misjoinder of the defendants upon various grounds set forth in its motion to dismiss.

42 None of these grounds are, however, in my opinion, well taken.

1. The fact that this bill is filed for the purpose of abating or restraining a nuisance affecting lands which lie wholly in the State of Georgia, does not require the action to be brought in the district where the injured property lies and thereby deprives this court of jurisdiction of the subject matter of the suit.

While an action to abate or restrain a nuisance is of a local nature and can only be maintained in a district having the proper territorial jurisdiction, the venue of such action is in the district where the nuisance itself is located. 29 Cyc. 1237; 14 Enc. Pl. & Pr. 1106, and cases cited.

In Mississippi & M. R. R. Co. v. Ward, 2 Black, 485, 495 it was held, under a bill filed by a steamboat owner in the district court of Iowa to abate a bridge across the Mississippi River constituting an obstruction to navigation, that as to so much of the bridge as lay

beyond the middle of the river an- outside of the district of Iowa the court "had no power over the local object inflicting the injury" and was without jurisdiction.

And in Horne v. City of Buffalo, 49 Hun. 76, it was held under a statute providing that certain actions, including those for a nuisance, must be tried in the County where the cause of action, or some part thereof, arose, that a suit against a city to abate a nuisance, caused by the dumping of street sweepings and other foul matter into the river in the County where the city was located, which injured residents in a village below in another County, should be tried in the County in which the dumping was done, as being the County in which the cause of action arose. In this case the court said: "By the common law as action for a nuisance is regarded as local in its nature, and the venue is required to be laid in the County where the nuisance is situated."

43 It was also held in People v. St. Louis, 10 Ill. 352, and Morris v. Remington, 2 Pars. Eq. Cas. 387, that the venue under a bill to restrain a nuisance by injunction is in the jurisdiction in which the nuisance is located; a result which would also seem to follow from the doctrine of Northern Ind. R. R. Co. v. Michigan Cent. R. R. Co. 15 How. 232, 242, that wherever the subject matter of a controversy is local, no jurisdiction attaches to a Circuit Court beyond the limit of the District in which the property is situated and no jurisdiction can be granted affecting such property, except in cases of contract, fraud or trust, where relief may be given by a decree *in personam*.

While none of these cases, except the Horne case, presented the precise situation in the present case, where the property constituting the nuisance lies in one district and the injured property in another, the reasoning in the Ward case that where the court "had no power over the local object inflicting the injury," its abatement was beyond the jurisdiction of the court, shows conclusively that the test of local jurisdiction in an action to abate a nuisance is the situs of the object inflicting the injury and not that of the object injured.

The various cases which hold that an action of tort seeking merely to recover damages caused by a nuisance, will lie in the jurisdiction where the injury is inflicted, although the object from which the injury proceeds is located elsewhere—there being, however, much conflict of authority even on this point, as shown by the cases collated in 14 Enc. Pl. & Pr. 1106, notes 2 and 3—clearly involve an entirely different question from that in reference to the venue of an action to abate the nuisance itself. The "power over the local object inflicting the injury" which is requisite in an action to abate the nuisance is wholly unnecessary in an action merely to recover damages, whose result cannot in any way affect the main-

44 tenance of the nuisance itself; and the cases holding that in an action of tort for damages alone the venue should be laid where the injured object is located, may it seem, be well sustained by analogy to the rule stated in Northern Ind. R. R. Co. v. Michigan Cent. R. R. Co., *supra* that an action for trespass *quare clausum*

fregit cannot be prosecuted where the act complained of was not done in the district.

2. The fact that, so far as the bill shows, the defendants are separate and independent concerns, conducting each its own separate affairs, does not prevent the bringing of a joint action against them, or create a misjoinder of the Ducktown Company with its co-defendant.

Without determining whether, in accordance with the broad statement in 2 Street's Fed. Co. Prac. sec. 1344, p. 815, the defence of misjoinder of defendants can be made by motion to dismiss as well as by demurrer, in accordance with the usual practice, I think that the sound rule established by the great weight of authority, is, that in a suit to abate or restrain a nuisance, as distinguished from an action for damages, all persons maintaining structures or carrying on operations whose effect mingles and combines in contributing to the injury of the plaintiff's property, may be properly joined as defendants, although each transacts his own business separately and independently from the others. The Debris Cases, (C. C.) 16 Fed. 25; Warren v. Parkjurst, 186 N. Y. Kingsbury v. Flowers, 65 Ala. 479, People v. Ditch & Min. Co. 66 Cal. 138; Woodyear v. Shaefer, 57 Md. 1.

In Oakland v. Water Front Co., 118 Cal. 234, 248, in which it was held that a demurrer would lie for misjoinder, the structures maintained by the different defendants which it was sought to abate as an obstruction to navigation were not only entirely separate and independently maintained, but had obviously no joint or combined effect upon the navigation, the effect of each being entirely separate and distinct from that of the others.

45 3. The fact that the Tennessee Copper Company is not suable in this case, over its objection, does not require the dismissal of the suit as to the Ducktown Company.

It is well settled by the weight of authority that when jurisdiction otherwise exists in a Circuit Court in a suit against several defendants, who might be sued either separately or jointly, the right of one of the defendants to object to the local jurisdiction of the Court on the ground that it is brought in a district in which neither he nor the plaintiff resides, is a privilege personal to himself, which he alone can raise, and in his behalf only, and that upon the dismissal of the suit as to him, upon his motion, where he is not an indispensible party to the suit, it will not be dismissed as to the remaining defendants properly before the Court. Benzinger Cash Reg. Co. v. National Cash Reg. Co., (C. C.) 42 Fed. 81 Smith v. Atchison T. & S. F. R. Co. (C. C.) 64 Fed. 1; Dominion National Bank v. Cotton Mills, (C. C.) 12 Fed. 181; Schiffer v. Anderson (C. C. A. 8th Cir.) 146 Fed. 457.

And jurisdiction of the suit will likewise be retained when although one of the defendants is a citizen of the same State with the plaintiff, whose presence would destroy the requisite diversity of citizenship, the suit has been dismissed as to him without prejudice, Smith v. Cotton Oil, (C. C. A. 5th Cir. 86 Fed. 459; or he has neither been served with process nor appeared. Doreman v. Bennett, 4 Mc-

Lean, 224, 7 Fed. Cas. 691. Nor can a defendant served with process avail himself of a want of jurisdiction as to another person named in the writ who is severed from him and no longer to be considered a defendant in the case. Craig v. Cummings, 2 Wash. (C. C.) 505, 6 Fed. Cas. 724.

Therefore, since each of the defendants in the present suit might have been sued severally as well as jointly (People v. Ditch Min. Co., 66 Cal. 138) and under the averments of the bill the Tennessee Copper Company is clearly not an indispensable party to the relief prayed in reference to the nuisance alleged to exist upon the
46 property of the Ducktown Company, the case may, under the foregoing authorities, be proceeded with against the latter Company, alone, although dismissed as to the former.

4. The fact, urged in argument, although not set out as one of the grounds of the motion to dismiss, that the plaintiffs, being citizens of New York and West Virginia, have sued two defendants, one of whom is a citizen of New Jersey and the other an alien corporation, does not deprive this court of jurisdiction.

Section 1 of the Act of 1875, as amended by section 1 of the Act of 1888, confers jurisdiction upon the Circuit Courts in suits "in which there shall be a controversy between citizens of different states . . . or a controversy between citizens of a State and foreign citizens." The plain object of this provision is to confer upon the Circuit Courts jurisdiction of all controversies between citizens of a State and citizens either of another State or a foreign nation, in which the requisite jurisdictional amount is involved. And while it may be said, from a somewhat metaphysical point of view, that in a suit brought by a citizen of one State against two defendants, one of whom is a citizen of another State and the other an alien, the controversy, considered in its entirety, is neither wholly between citizens of different states nor between a citizen of a State and a foreign citizen, yet as such controversy in each and all of its elements as between the plaintiff and each of the defendants separately, clearly comes within the provisions of the Act the suit, is not, under a just construction of the statute and in view of its plain intent, to be excluded from the jurisdiction of the Circuit Court merely because of the joinder of the two defendants in a single action.

To hold otherwise would, I think, be to give the language of the statute a strained and narrow construction, not required by its letter, and defeating its manifest purpose of vesting in the Circuit Courts jurisdiction of controversies between three different classes of persons.

47 This view is in accordance with the clear weight of authority.

In Ballin v. Lehr, (C. C.) 24 Fed. 193, and Roberts v. Ry. & Nav. Co., (C. C.) 104 Fed. 577, affirmed in a carefully considered opinion in Roberts v. Ry. & Nav. Co., (C. C. A. 9th Cir.) 121 Fed. 785, in each of which the underlying question involved in determining the right of removal to the Circuit Court was whether the entire suit was one of which the Circuit Courts were given jurisdiction by section 1 of the Acts of 1875 and 1888, it was held that a suit brought by a

citizen of one State against two defendants, one of whom is a citizen of another State and the other an alien, is a suit of which the Circuit Courts are given jurisdiction, and which as such is removable to the Circuit Court on petition of the defendants. See also Rateau v. Bernard, 3 Blatchf. 242, 20 Fed. Cas. 305.

The case of Tracy v. Morel, (C. C.) 88 Fed. 801, in which the statement of a contrary doctrine, appearing in Black's Dillon on the Removal of Causes (Sec. 84, p. 131)—which is not, however, found in the earlier editions of Dillon's Removal of Causes—is approved, without discussion, is clearly not supported by the cases of Hervey v. Illinois Mid. Ry. Co., 7 Biss. 103, 12 Red. Cas. 60, and King v. Cornell, 106 U. S. 395, which are cited as stating the same rule. The Hervey case involved merely the obvious proposition that a suit could not be removed under the Act of 1875 on the ground of a separate controversy "wholly between citizens of different states" when it appeared that alien parties were also interested in the alleged separate controversy—there being, it is to be noted, no provision in that Act for the removal of a suit on the ground of a separate controversy between citizens of a State and aliens; and in King v. Cornell it was merely held that under the Act of 1875 an alien had no right of removal on the ground of a separate controversy.

48 I therefore conclude, both upon principle and the weight of authority, that a suit brought by a citizen of one State against a citizen of another State and an alien as defendants, involving the requisite jurisdictional amount, is within the jurisdiction of a Circuit Court of the United States.

Furthermore even if there had been originally a jurisdictional defect by reason of the joinder of the Tennessee Copper Company as a co-defendant with the Ducktown Company, this objection would it seems, be cured, under the doctrine of Smith v. Cotton Oil Company and other cases hereinabove cited, by the dismissal of the suit against the Tennessee Copper Company, leaving in the suit merely a controversy between citizens of New York and West Virginia as complainants and an alien corporation as defendant, of which a Circuit Court has undoubted jurisdiction.

5. The objection to the jurisdiction set out in the motion to dismiss in reference to the amount in controversy, has been cured by the amendments made in the bill.

No other objections being pointed out by the Ducktown Company's motion to dismiss, it results that the motion must be overruled.

An order will accordingly be entered dismissing the suit as to the Tennessee Copper Company in accordance with this opinion, and overruling the motion of the Ducktown Sulphur, Copper & Iron Company.

SANFORD, *Judge.*

February 15, 1910.

Endorsed: Filed Feb. 16, 1910. D. L. Snodgrass, Clerk, R. F. McClure, D. C.

49 In the United States Circuit Court at Chattanooga.

No. 1012. In Equity.

J. HARVEY LADEW et al.
vs.
TENNESSEE COPPER CO. et al.

Memorandum Opinion as to Costs.

Since the filing of the opinion of February 15 1910, in which it was adjudged that the motion of the Tennessee Copper Company to dismiss should be allowed, but without the adjudication of costs, I note that in Section Five of the Judiciary Act of March 3, 1875 ch. 137, 18 Stat. 470, it is specifically provided that where a suit brought in the Circuit Court is dismissed or remanded on the ground that it does not really and substantially involve a suit or controversy properly within the jurisdiction of the court, the court shall make such order as to costs as shall be just. In Mansfield C. & L. M. Railway Co v. Swan 11 U. S. 379 in a removed case, which was remanded under this section, the court said: "These provisions were manifestly designed to avoid the application of the general rule, which, in cases where the suit failed for want of jurisdiction, denied the authority of the Court to award judgement against the losing party, even for costs. McIver v. Wattles, 9 Wheat. 650; The Mayor v. Cooper, 6 Wall. 247." This applies likewise to an original suit dismissed for want of jurisdiction.

The direction in the former opinion that the suit should be dismissed as to the Tennessee Copper Co. without costs, was accordingly erroneous, and the order dismissing the suit as to said defendant will adjudge against the plaintiffs all costs incident to making the said defendant a party.

SANFORD, *Judge.*

March 14, 1910.

Endorsed: No. 1012—J. Harvey Ladew vs. Tenn. Copper Co. et al. Memo. Opinion as to Costs. Filed March 14, 1910. R. M. Watkins, Deputy Clerk.

50 United States Circuit Court for the Eastern District of Tennessee, Southern Division.

No. 1012.

J. HARVEY LADEW, LOUISE BERRY WALL LADEW, Individually and as Trustee under the Will of Edward R. Ladew, Deceased; Sadie McN. Wilson, Bruce C. Wilson, Ray G. McN. Wilson, an Infant, Suing by Her Next Friend, Bruce C. Wilson; Bruce C. Wilson, as Next Friend of the Infant Plaintiff, Ray G. McN. Wilson, Complainants,

vs.

TENNESSEE COPPER COMPANY, DUCKTOWN SULPHUR, COPPER & IRON CO. (LIMITED), Defendants.

Decree.

The defendants, Tennessee Copper Co. and Ducktown Sulphur Copper & Iron Co., Limited, having severally entered their special appearance for the sole purpose of objecting to the jurisdiction of the Court, and having moved the Court to dismiss the bill on the ground that this court has no jurisdiction herein; and said motions coming on to be heard, the same were set for hearing on Dec. 5th, 1908. On the day mentioned the motions aforesaid were argued at bar and thereafter submitted and thereafter on Feb. 15th, 1910, the Court being advised, rendered an opinion in writing now in the record.

Pursuant to the opinion aforesaid, it is now ordered, adjudged and decreed as follows:

51 In so far as the defendant, Tennessee Copper Co. is concerned this Court has no jurisdiction, over the person of said defendant, and the motion of the said Tennessee Copper Co. to dismiss said bill of complaint for want of jurisdiction is sustained, and this action is dismissed for want of jurisdicton as to the defendant. Tennessee Copper Co. The plaintiffs will pay all costs incident to making said defendant a party for which execution will issue.

In so far as the defendant Ducktown Sulphur Copper & Iron Co. Limited, is concerned this court has jurisdiction of the cause set forth in the bill of complaint herein, and the motion to dismiss the bill of complaint for want of jurisdiction as entered by said Ducktown Sulphur Copper & Iron Co., Limited, is overruled, to which it excepts.

Ordered and decreed this March 18th, 1910.

SANFORD, *Judge.*

O. K.
W. B. MILLER,
Att'y for D. S., C. & I. Co.

No exception.
HOWARD CORNICK,
Att'y for T. C. Co.

(Endorsed:) No. 1012—J. H. Ladew vs. Tennessee Copper Co. Decree—Filed March 18—1910—D. L. Snodgrass, Clerk.

52 United States Circuit Court for the Eastern District of Tennessee, Southern Division.

No. 1012.

J. HARVEY LADEW, LOUISE BERRY WALL LADEW, Individually and as Trustee under the Will of Edward R. Ladew, Deceased; Sadie McN. Wilson, Bruce C. Wilson, —— ——, an Infant, Suing by Her Next Friend, Bruce C. Wilson; Bruce C. Wilson, as Next Friend of the Infant Plaintiff, Ray G. McN. Wilson, Complainants,

vs.

TENNESSEE COPPER CO., DUCKTOWN SULPHUR COPPER & IRON CO., LIMITED, Defendants.

Petition for Appeal.

Complainants above named J. Harvey Ladew, Louise Berry Ladew, individually and as trustee under the will of Edward R. Ladew, deceased, Sadie McN. Wilson, Bruce C. Wilson, Ray G. McN. Wilson, an infant suing by her next friend, Bruce C. Wilson, Bruce C. Wilson, as next friend of the infant plaintiff Ray McN. Wilson, conceiving themselves aggrieved by the final decree order and judgment in this cause rendered on March 1910 dismissing this action as to the defendant, Tennessee Copper Co. do hereby jointly and separately appeal from so much of said final decree or order as adjudges and decrees that this court has no jurisdiction of the action as instituted against said defendant, Tennessee Copper Co. and dismisses the bill of Complaint as to said defendant. The complainants aforesaid pray that an appeal to the Supreme Court of the United States may be allowed and that a transcript of the record proceedings and papers upon which the final decree, order and judgment aforesaid were made, duly authenticated may be sent to said Supreme Court of the United States.

53 With this petition for appeal the complainants aforesaid as appellants file an assignment of errors setting forth such error or errors as are intended to be urged in the Supreme Court of the United States on appeal, and your petitioners will ever pray.

H. B. CLOSSON,
52 Williams St., New York,
CHARLES H. SHIELD,
BENJAMIN F. WASHER,
Louisville, Ky.,
Of Counsel for Petitioners.

CHARLES SEYMOUR,
Knoxville, Tenn.,
Sol's for Petitioners.

(Endorsed:) No. 1012. J. H. Ladew vs. Tennessee Copper Co. Petition for Appeal—Filed March 18, 1910. D. L. Snodgrass, Clerk.

54 United States Circuit Court for the Eastern District of Tennessee, Southern Division.

No. 1012.

J. HARVEY LADEW, LOUISE BERRY WALL LADEW, Individually and as Trustee under the Will of Edward R. Ladew; Sadie McN. Wilson, Bruce C. Wilson, Ray G. McN. Wilson, an Infant, Suing by Her Next Friend, Bruce C. Wilson; Bruce C. Wilson, as Next Friend of the Infant Plaintiff, Ray G. McN. Wilson, Complainants,

vs.

TENNESSEE COPPER CO., DUCKTOWN SULPHUR, COPPER & IRON CO. (LIMITED), Defendants.

Assignment of Errors.

The complainants above named in connection with their petition for appeal make the following assignment of errors; to be urged by them in the Supreme Court of the United States on appeal;

(1) The court erred in its finding and ruling that the defendant, Tennessee Copper Co., was not properly or at all before this Court by the service of process herein, for all purposes of relief and remedy as set forth in the bill of complaint.

(2) The court erred in its ruling that the United States Circuit Court for the Eastern District of Tennessee, Southern Division, was not and is not possessed of jurisdiction in this cause as to the defendant, Tennessee Copper Co.

(3) The Court erred in ordering bill of complaint in this cause dismissed as to the defendant, Tennessee Copper Co.

CHARLES SEYMOUR, *Solicitor.*

H. B. CLOSSON,
52 Williams St., New York,
CHARLES H. SHEILD,
BENJAMIN F. WASHER,
Louisville, Ky.,
Of Counsel.

Endorsed: No. 1012—J. H. Ladew vs. Tennessee Copper Co. Assignment of Errors. Filed March 18, 1910. D. L. Snodgrass, Clerk.

55 United States Circuit Court for the Eastern District of Tennessee, Southern Division.

No. 1012.

J. HARVEY LADEW, LOUISE BERRY WALL LADEW, Individually and as Trustee under the Will of Edward R. Ladew, Deceased; Sadie McN. Wilson, Bruce C. Wilson, Ray G. McN. Wilson, an Infant, Suing by Her Next Friend, Bruce C. Wilson; Bruce C. Wilson, as Next Friend of the Infant Plaintiff, Ray G. McN. Wilson, Complainants,

vs.

TENNESSEE COPPER CO., DUCKTOWN SULPHUR, COPPER & IRON CO. (LIMITED), Defendants.

Order Allowing Appeal.

The complainants, J. Harvey Ladew, Louise Berry Wall Ladew, individually and as trustee under the will of Edward R. Ladew, deceased Sadie McN. Wilson, Bruce C. Wilson, Ray G. McN. Wilson, an infant suing by her next friend, Bruce C. Wilson; and Bruce C. Wilson, as next friend of the infant plaintiff, Ray G. McN. Wilson, having filed their petition for appeal from the final decree of this court dismissing the bill of complaint as to the defendant, Tennessee Copper Co., and the Court being advised it is ordered that the appeal to the Supreme Court of the United States as asked in the petition aforesaid, be and the same is allowed on the plaintiffs giving bond as required by law in the sum of five hundred dollars. The Clerk is directed to prepare a transcript of the record, proceedings and papers upon which the final decree aforesaid was made and after due
56 authentication of the same, such transcript shall at once be transmitted to the Supreme Court of the United States.

This March 18, 1910.

EDWARD T. SANFORD,
U. S. District Judge, Holding Circuit Court.

Endorsed: No. 1012.—J. H. Ladew vs. Tennessee Copper Co.—Order Allowing Appeal. Filed March 18, 1910—D. L. Snodgrass, Clerk.

57 United States Circuit Court for the Eastern District of Tennessee, Southern Division.

Know all men by these presents, That we, J. Harvey Ladew Louise Berry Wall Ladew, individually and as trustee under the will of Edward R. Ladew, deceased, Sadie McN. Wilson, Bruce C. Wilson, an infant suing by her next friend, Bruce C. Wilson, Bruce C. Wilson as next friend of the infant plaintiff; Ray G. McN. Wilson, as principals and American Surety Company of New York as surety, are held and firmly bound unto the defendant in error Tennessee

Copper Co. in the full and just sum of five hundred dollars to be paid to the said defendant, Tennessee Copper Co., or its certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally, by these presents.

Sealed with our seals and dated this 18th day of March in the year of our Lord one thousand nine hundred and ten.

Whereas lately at a Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee in a suit depending in said Court, between J. Harvey Ladew, et al., plaintiffs, and Tennessee Copper Co., defendant, a judgment was rendered against the said J. Harvey Ladew, et al., and the said J. Harvey Ladew et al. having obtained a writ of error and filed a copy thereof in the Clerk's office of the said court to reverse the judgment in the aforesaid suit and a citation directed to the said Tennessee Copper Co. citing it and admonishing it to be and appear at a session of the Supreme Court of the United States to be hold*ing* at the City of Washington on the 11th day of April next.

Now, the condition of the above obligation is such, that if the said J. Harvey Ladew et al., shall prosecute said writ of error to effect and answer all damages and cost if they fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

58 J. HARVEY LADEW, [SEAL.]
LOUISE BERRY WALL LADEW, [SEAL.]
SADIE McN. WILSON, [SEAL.]
BRUCE C. WILSON, [SEAL.]
By CHAS. SEYMOUR, *Solicitor.*
AMERICAN SURETY CO. OF NEW YORK,
By H. D. HUFFAKER, *Res. Vice P.*
Attest: WM. T. COOPER, *Res. Ass't Sec'y.*

Sealed and delivered in presence of

——— ———.

Approved by

EDWARD T. SANFORD,
District Judge, Holding the Circuit Court.

Endorsed: No. 1012—J. H. Ladew vs. Tennessee Copper Co.—Bond—Filed March 18, 1910. D. L. Snodgrass, Clerk.

59 In the Circuit Court of the United States, Eastern District of Tennessee, Southern Division.

No. 1012. In Equity.

J. HARVEY LADEW et al.
v.
TENNESSEE COPPER COMPANY et al.

In this cause I hereby certify that the decree of dismissal herein made as to the defendant Tennessee Copper Company is based solely on the want of jurisdiction of the person of the defendant, on the ground that under the record in this cause the jurisdiction of a Circuit Court of the United States of the controversy between the complainants and said defendant can be founded only on the fact that such controversy is between citizens of different States, and that as neither the complainants nor said defendant reside in this district and the said defendant has not waived the want of jurisdiction in the Circuit Court of this district, this suit cannot be brought against it in this court and no jurisdiction of its person has been acquired by the proceedings herein.

This certificate is made conformably to section 5 of the Act of Congress of March 3, 1891, chapter 517, and the opinions filed herein are made a part of the record and will be certified and sent up as part of the proceedings, together with this certificate.

Dated this 18th day of March, A. D., 1910.

EDWARD T. SANFORD,
District Judge Holding the Circuit Court of the United States for the Eastern District of Tennessee.

[Endorsed:] No. 1012. (6) J. H. Ladew et al. vs. Tenn. Copper Co. et al. 16. Certificate of Judge. Filed March 18, 1910. D. L. Snodgrass, Clerk.

60 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Tennessee Copper Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the city of Washington on Monday the 11th day of April 1910, pursuant to an appeal, duly allowed by the Circuit Court for the Southern Division of the Eastern District of Tennessee, and filed in the Clerk's office of said Court on the 18th day of March A. D. 1910; in a cause wherein J. Harvey Ladew and others are appellants, and you are appellee, to show cause if any, why the decree rendered against the said appellants as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the

Supreme Court of the United States, this 18th day of March A. D. 1910.

EDWARD T. SANFORD,
District Judge Holding the Circuit Court.

Service of a copy of the within citation is hereby admitted this 19th day of March A. D. 1910.

HOWARD CORNICK,
Attorney for Appellee.

61 THE UNITED STATES OF AMERICA,
Eastern District of Tennessee,
Southern Division, ss:

I, D. L. Snodgrass, Clerk of the Circuit Court of the United States, within and for the District aforesaid, do hereby certify that the foregoing Sixty-One Pages is a full, true and perfect transcript of the record and proceedings in the case of J. Harvey Ladew against the Tennessee Copper Company and Ducktown Sulphur, Copper & Iron Co., No. 101? in this court, as the same appear of record and on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court, at Chattanooga, Tennessee, this 25th day of March, A. D., 1910.

[Seal Circuit Court of the United States, Eastern District of Tennessee.]

D. L. SNODGRASS, *Clerk.*

Endorsed on cover: File No. 22,094. E. Tennessee C. C. U. S. Term No. 868. J. Harvey Ladew, Louise Berry Wall Ladew, individually and as trustee under the will of Edward R. Ladew, deceased, et al., appellants, vs. Tennessee Copper Company. Filed April 8th, 1910. File No. 22,094.

In The

Supreme Court of the United States

OCTOBER TERM, 1910

J. Harvey Ladew, Louise Berry Wall Ladew, individually and as Trustee under the will of Edward R. Ladew, Deceased, et al.,
Appellants,
versus
Tennessee Copper Company,
Appellee.
No. 868.

State of Tennessee,
County of Knox.

I, Howard Cornick, make oath in due form of law that I am one of the counsel for appellee in the above styled cause and that I caused a copy of the attached notice, motion and brief of argument to be served on September 9th, 1910, upon Mr. Charles Seymour, one of the counsel for the appellants, and caused copies thereof to be mailed to all other of the counsel of record for appellants, that said service of notice of said copies was more than three weeks before the time fixed for submitting the motion, and that the notices to counsel other than Mr. Charles Seymour, together with copies of the motion and of the argument were properly addressed to said counsel and duly posted by mail with postage prepaid in time to reach them by due course of mail more than three weeks before the time fixed in said notice for presentation of said motion.

Howard Cornick.

Subscribed and sworn to before me this 12th day of September, 1910.

SEAL.

T. G. McConnell,
Notary Public.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910

J. HARVEY LADEW, LOUISE BERRY WALL LADEW, INDIVIDUALLY AND AS TRUSTEE UNDER THE WILL OF EDWARD R. LADEW, DECEASED, ET AL.,
Appellants,
versus
TENNESSEE COPPER COMPANY,
Appellee.
No. 868.

MOTION TO DISMISS.

And now comes the Tennessee Copper Company, the appellee, and moves the court to dismiss the appeal herein for the following reasons, namely:

It appears that the suit is one against the Tennessee Copper Company and the Ducktown Sulphur, Copper & Iron Company, Limited, as defendants jointly. That the right of action sought to be asserted therein is joint and the relief sought therein is joint. (*Record, pp.* 1 *to* 17, *inc.*)

It appears also that said action as to the Ducktown Sulphur, Copper & Iron Company, Limited, is still pending and undisposed of in the United States Circuit Court for the Eastern District of Tennessee, Southern Division. (*Record, p.* 36.)

Wherefore, appellee moves to dismiss the appeal as aforesaid because of lack of jurisdiction in this court, said appeal being premature.

HOWARD CORNICK.
JOHN H. FRANTZ.
Counsel for Appellee.

MARTIN VOGEL,
Of Counsel.

In The

Supreme Court of the United States

OCTOBER TERM, 1910

J. Harvey Ladew, Louise Berry Wall Ladew, individually and as Trustee under the will of Edward R. Ladew, Deceased, et al.,
Appellants,
versus
Tennessee Copper Company,
Appellee.
No. 868.

To Henry B. Closson, Charles H. Shield, Benj. F. Washer and Charles Seymour, counsel for appellants in the above entitled cause:

You will please take notice that on Monday, the tenth day of October, 1910, at the opening of the Court, or as soon thereafter as counsel can be heard, the motion, of which the attached is a copy, will be submitted to the Supreme Court of the United States for the decision of the said court thereon. Annexed hereto is a copy of the brief of argument to be submitted with the said motion in support thereof.

Howard Cornick.
John H. Frantz.
Counsel for Appellee.

Martin Vogel,
Of Counsel.

Service of a copy of the above notice is hereby admitted, this 9th day of September, 1910.

Charles Seymour,
Counsel for Appellants.

In The

Supreme Court of the United States

OCTOBER TERM, 1910

J. Harvey Ladew, Louise Berry Wall Ladew, individually and as Trustee under the will of Edward R. Ladew, Deceased, et al.,
Appellants,
versus
Tennessee Copper Company,
Appellee.
No. 868.

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL.

Statement of the Case.

The bill in this cause was filed by complainants against The Tennessee Copper Company and the Ducktown Sulphur, Copper & Iron Company, Limited, in the United States Circuit Court for the Eastern District of Tennessee, Southern Division. The Tennessee Copper Co. is alleged to be a corporation organized and existing under the laws of the State of New Jersey; the Ducktown Sulphur, Copper & Iron Company, Limited, is alleged in the bill to be a corporation of Great Britain. (*record pp.* 1 *and* 2.) The bill further alleges that complainants are citizens and residents of the States of New York and West Virginia, respectively, (*record, p.* 1.) and are owners of large tracts of land situated in the State of Georgia, and that these lands have been injured in the past and are being injured by smoke, fumes, gases and vapors emanating from the smelter plants of these two defendants; (*record p.* 12.)

In order to show a joint wrong on the part of said defendants and to justify the joint action against them, complainants, after alleging the generation of the smoke, gases, etc., in the furnaces of the defendants, say :

> "Within a short distance from the works and property of the defendants the said smoke, fumes, vapors and gases and other deleterious substances so generated by each respectively inextricably mingle and are together discharged upon the lands and forests and trees of your orators, etc." (*Record, p.* 13.)

The relief sought is abatement of the alleged nuisance, together with an injunction against defendants jointly, restraining them from further maintenance thereof, (*record, pp.* 16-17.)

Counsel for Tennessee Copper Company entered special appearance in said cause for the purpose of objecting to the jurisdiction of the court, and thereupon moved to dismiss the bill as to that defendant because not brought in the District where the said defendant resided, (*record, p.* 20.) A like entry of appearance and motion were made on behalf of the defendant Ducktown Sulphur, Copper & Iron Company, Limited, (*record, pp.* 21-22.) Upon the hearing the court sustained the motion of the Tennessee Copper Company and dismissed the bill as to it for lack of jurisdiction, but overruled the motion of the Ducktown Sulphur, Copper & Iron Company, Limited, and retained the bill as to it, (*opinion of the court, record, pp.* 23 *to* 35, *inc.*) (*See decree, record, p.* 36.)

Thereupon, complainant prayed an appeal to this Court, which was allowed, (*record, pp.* 37, 38 *and* 39.)

Upon motion of complainant the cause has been advanced upon the docket and stands for hearing on October 11th, 1910.

The appeal is premature, and, therefore, the Court is without jurisdiction to hear and determine the same.

ARGUMENT.

Probably the leading case upon this question is that of *Hohurst versus Hamburg-American Packet Company,*

148 *U. S. Supreme Court Reports, p.* 262. The suit in that case was against the Hamburg-American Packet Company and several individual defendants. Motion was made by the Hamburg-American Packet Company to dismiss as to it because of lack of jurisdiction in the court. This motion was sustained and an appeal taken to this court. The court in its opinion said:

"So far as appears from the record, the suit is still pending and undetermined as against the co-defendants of the company. We are of opinion, therefore, that this appeal cannot be maintained because the decree rendered in favor of the company was not a final decree." Page 264.

After discussion of authorities, the court concludes:

"There are cases in equity in which a decree disposing of every ground of contention between the parties, except as to the ascertainment of an amount in a matter-separable from the other subjects of controversy, and relating only to some of the defendants, may be treated as final, though retained for the determination of such severable matter. *Hill vs. Chicago & Evanston Railroad,* 140 *U. S.,* 52. But this case presents no such aspect. Complainant insisted, by his amended bill, that the alleged liability was joint, and that "all the defendants have cooperated and participated in all the said acts and infringements."

"In Shaw vs. Quincy Mining Co., 145 U. S., 444, a bill was filed against the mining company and others in the Circuit Court of the United States for the Southern District of New York, and service of subpoena was made upon the secretary of the company. The company appeared specially and moved for an order to set aside the service, which was granted, whereupon complainant applied to this court by petition for writ of mandamus to the judges of the Circuit Court to command them to take jurisdiction against the company upon the bill. The ground on which our jurisdiction was invoked was the inadequacy of any other remedy, and it was ar-

gued that as the same could proceed as to the other defendants, no final judgment could be entered upon the order of the Circuit Court and no appeal taken therefrom.

Under the circumstances

This appeal must be dismissed for want of jurisdiction, and it is so ordered."

This case is in striking analogy to the case at bar. The allegations of the bill tend to show joint liability on the part of the defendants, and, as in the case above quoted, the ground of jurisdiction is the "inadequacy of any other remedy."

Another case in point is *Bank of Rondout vs. Smith*, 156 *U. S. Rep., p.* 330, and the Court distinguished the case from that of *Hill vs. Chicago & Evanston Railroad*, 140 *U. S.*, 52, as follows:

"In Hill vs. Chicago & Evanston Railroad, 140 U. S., 52, a decree had been rendered June 8th, 1885, dismissing a bill as to certain parties for want of equity, and denying relief to complainant upon all matters and things in controversy except as to an amount of money paid by one of the defendants, and for the purpose of ascertaining that amount the case was retained as to some of the defendants, which finally resulted in a decree, July 14, 1887, as to that severable matter. It was held that, under these circumstances, the decree of June 8th, 1885, was a final decree as to all matters determined by it, and that its finality was not affected by the fact that there was left to be determined a further severable matter, in respect of which the case was retained only as against the parties interested in that matter. An appeal had been prayed from the decree of June 8th, 1885, but the transcript of the record not having been filed at the next term after the appeal was taken, it was, on motion, dismissed. *Hill vs. Chicago & Evanston Railroad*, 129 *U. S.*, 170."

The same rule is laid down in ex parte *National Enameling Company*, 201 *U. S., p.* 160. In distinguishing

between *Hill versus Chicago & Evanston Railroad, supra,* and *Hohurst vs. Hamburg, etc., supra,* this court said:

"In Hill vs. Chicago & Evanston Railroad Company, supra, there had been an order of dismissal in favor of some defendants, together with a reference to a master of a separable controversy between the plaintiff and other parties, and the court observd, (p. 54):

"But there was no adjudication as to the payment of the amount to be ascertained by the master; that remained unsettled; it was, however, a severable matter from the other subjects of controversy and did not affect their determination. The fact that it was not disposed of did not change the finality of the decree as to the defendants against whom the bill was dismissed; that amount, or to whom made payable, did not concern them. They were no longer parties to the suit for any purpose. The appeal from the subsequent decree did not reinstate them. All the merits of the controversy pending between them and the complainant were disposed of, and could not be again reopened, except on appeal from that decree. As to the other parties, it remained to ascertain the amount of one item and to determine as to its payment."

"But as held in Hohurst vs. Hamburg-American Packet Company, supra, that rule does not apply to cases where the liability of the defendants is alleged to be joint; and, therefore, cannot be a case in which there is but a single defendant."

It is confidently submitted that the appeal is premature and, as stated in Hohurst vs. Hamburg-American Packet Company, supra, "must be dismissed for want of jurisdiction."

All of which is respectfully submitted.

HOWARD CORNICK.
JOHN H. FRANTZ.
Counsel for Appellee.

MARTIN VOGEL,
Of Counsel.

IN THE 1

Supreme Court of the United States.

J. HARVEY LADEW, LOUISE BERRY WALL LADEW, individually and as Trustees under the Will of Edward R. Ladew, deceased, SADIE McN. WILSON, BRUCE C. WILSON, RAY G. McN. WILSON, an infant, suing by her next friend Bruce C. Wilson,
Appellants,

AGAINST

THE TENNESSEE COPPER COMPANY,
Appellee.

October Term, 1909.
No. 868. 2

TAKE NOTICE that upon the record heretofore filed in this cause, and the affidavit of Henry B. Closson, verified the 25th day of April, 1910, a copy of which is herewith served upon you, I shall move the Court on Monday, May 2nd, 1910, at the opening of Court on that day, to advance this cause and set the same for argument on a day to be fixed by the Court. 3

DATED, April 25th, 1910.

Yours, &c.,

HENRY B. CLOSSON,
Of Counsel for Appellants,
52 William Street,
Borough of Manhattan,
The City of New York,
N. Y.

To CORNICK, WRIGHT & FRANTZ, Esqrs.,
Solicitors for Tennessee Copper Co., Appellee,
Knoxville, Tennessee.

IN THE SUPREME COURT OF THE UNITED STATES.

J. HARVEY LADEW, LOUISE BERRY WALL LADEW, individually and as Trustee under the Will of Edward R. Ladew, deceased, SADIE MCN. WILSON, BRUCE C. WILSON, RAY G. MCN. WILSON, an infant, suing by her next friend Bruce C. Wilson,
Appellants,

AGAINST

THE TENNESSEE COPPER COMPANY,
Appellee.

October Term 1909. No. 868.

STATE OF NEW YORK, County of New York, } ss:

HENRY B. CLOSSON, being duly sworn, deposes and says:

Statement of the Matter Involved.

I am of counsel for the complainants and appellants in this cause. The appeal is from a judgment of the Circuit Court of the United States for the Eastern District of Tennessee, dismissing the suit as against the appellee The Tennessee Copper Company, upon the sole ground that the Court was without jurisdiction to entertain the suit. The record was filed and the case docketed in this Court on April 8th, 1910.

The complainants are citizens of New York and of West Virginia. The defendant The Tennessee

Copper Company is a corporation organized and existing under the laws of the State of New Jersey, but engaged in carrying on a large mining and smelting industry in the Eastern District of Tennessee. The complainants are the owners of timber lands and of bark rights in timber lands, aggregating over 24,000 acres, situated in Fannin, Gilmore and Pickens Counties, in the State of Georgia, just across the Tennessee line. The complaint of the Bill is that the timber upon these lands is being ruined by the sulphurous gases emitted from the smelting plant of the defendant in Tennessee; and the relief demanded is the abatement by the Circuit Court for the Eastern District of Tennessee, sitting as a Court of Equity, of this nuisance thus maintained within its jurisdiction. The facts are the same as those which were before this Court in the case of the *State of Georgia* v. *The Tennessee Copper Co.*, 206 U. S., 230.

The Bill was filed on or about May 22nd, 1908; after it had become apparent that the State of Georgia had no present intention of applying to this Court for the issuance of the injunction which the Court had ordered might issue upon its application in the previous October. In July, 1908, the defendant The Tennessee Copper Company appeared specially in the suit for the purpose of objecting to the jurisdiction of the Court, and filed a motion to dismiss the suit upon the ground that neither it nor any of the plaintiffs was an inhabitant of the District in which the suit was brought. These facts were conceded by the complainants, their contention being, on the other hand, that the suit, being one to abate a nuisance, was a suit of a local nature, to enforce a claim against real property within the meaning of Section 8 of the Act of March 3rd, 1875; that this Court had already held in the case of *Mississippi R. R. Co.* v. *Ward* (2 Black, 485) that such a suit to abate a nuisance is a local suit and can be brought only in the District where

100 the nuisance is situated, and that by the provisions of Section 8 of the Act of March 3rd, 1875, the Circuit Court of that District has jurisdiction of such a suit where the necessary diversity of citizenship exists, although neither of the parties be domiciled in the District. In December, 1908, the motion to dismiss the suit was argued, and briefs by both sides submitted at a Term of the Circuit Court held in Knoxville, Tennessee, Honorable Edward T. Sanford, District Judge, presiding. Judge Sanford withheld a decision upon this motion for nearly fourteen months, until February 18th, 1910, when he handed down an opinion holding that a bill in equity to abate a nuisance is not a local suit within
111 the meaning of Section 8 of the Act of March 3rd, 1875, from which it would follow that no Federal Court in any case except at the suit of a resident of the District has the power to abate a nuisance within its jurisdiction if maintained by a corporation carrying on business there, but incorporated elsewhere. The correctness of this conclusion is the sole question presented by this appeal. Judge Sanford's opinion is reported in *Ladew* v. *Tennessee Copper Co.*, Fed. Rep.

Reasons for the Application.

The suit is solely for the abatement of a nuisance;
112 which, if the allegations of the Bill be true, is working irreparable injury to the timber lands of the complainants in the the three Counties of the State of Georgia, referred to. If the complainants are right in their contention, the nuisance ought to be abated at once. To postpone the hearing of the appeal for the further year and a half before the case can be reached in its order may be tantamount to the denial of relief. The complainants have already been seriously prejudiced by the action of the Court below in delaying its decision upon the motion for

more than a year. Apart from the question of jurisdiction, the issues upon the merits are the same as those in the case of State of Georgia against the appellee, above referred to (206 U. S., 230); and the case may be said to come within the spirit of subdivision 4 of Rule 26, to wit: 13

> "Cases once adjudicated by this Court upon the merits and again brought up by writ of error or appeal, may be advanced by leave of the Court on motion of either party."

H. B. CLOSSON.

Sworn to before me, this 20th day of April, 1910.

EDWARD C. SPERRY, 14
[SEAL.] Notary Public,
New York County, N. Y.

15

16 **Appendix.**

IN THE UNITED STATES CIRCUIT COURT
AT CHATTANOOGA.

J. HARVEY LADEW *et al.*	No. 1012.
v.	In Equity.
TENNESSEE COPPER CO., *et al.*	

17 **Opinion on the defendants' motions to dismiss the bill.**

This bill was filed by the complainants, citizens and residents of the States of New York and West Virginia, against the Tennessee Copper Company, a corporation of the State of New Jersey, and the Ducktown Sulphur, Copper & Iron Company, Ltd., a corporation of the Kingdom of Great Britain, each having its main office and business in Polk County, Tennessee, within this judicial district.

The bill alleges that the complainants are the joint owners of certain tracts of forest lands and timber rights in the State of Georgia, containing
18 altogether twenty-four thousand acres and timber aggregating in value many thousand dollars; that the defendants are engaged in mining and manufacturing sulphur and copper ores in Polk County, Tennessee, near the Georgia State line, within a short distance of complainants' property, and have erected and are operating furnaces, smelters and ovens for roasting and reducing such ores, in close proximity to one another, upon lands in Polk County, Tennessee, owned or leased by them, respectively; that "by reason of their ownership of the lands and forests aforesaid," complainants "both in law and equity are possessed of a right and claim in, to and

against the lands and tenements of the defendants 19
in the nature of an easement thereupon that same shall not be used in a manner to injure or destroy the said lands and forests of your orators adjacent thereto as a aforesaid;" that the defendants by means of said furnaces, smelters and ovens, and in other ways, generate vast quantities of smoke and fumes, which inextricably mingle a short distance from their works and are together discharged upon complainants' lands and forests, and have destroyed much of complainants' forests and inflicted great damage; that the zone of destruction is constantly increasing, and the defendants' operations, if permitted to continue, will destroy all of complainants' forests and timber and other forms 20
of plant and tree life, and render their lands barren, unfit for occupation, and valueless; that it is impossible to calculate or approximate the damage threatened, and the complainants are without remedy in a court of law, and unless relief is granted, will suffer irreparable injury; and that "an injunction to prevent the perpetration of said wrongs is the only adequate relief that complainants can secure."

And "to the end that" the aforesaid right and claim of complainants to and upon the properties of the defendants, that the same shall not be used in a manner to destroy or injure the lands and forests of complainants, may be declared and enforced, and 21
that the nuisance maintained upon said properties may be abated by and under the direction of the court, through its own officers or otherwise, and that such changes be made by and under its direction in and to the defendants' properties as shall prevent the discharge therefrom upon complainants' lands and forests of the aforesaid deleterious substances, and that the defendants may be restrained by injunction from doing or causing the acts complained of, or the continuance, the complainants pray: that writs of injunction be granted restraining and enjoining the defendants, their

22 officers, agents and servants, from maintaining or operating upon their premises any oven, furnace or appliance giving forth any of the smoke and fumes complained of, or otherwise producing or causing any noxious or injurious smoke or fumes upon the complainants' lands, and commanding them to desist and refrain from using, maintaining or operating any furnace or other appliance or copper reducing method giving off or discharging any noxious smoke or fumes upon the complainants' lands; and they further pray for general relief.

By an amendment to the bill, made by leave of the court, complainants further allege that the properties and operations of each defendant consti-
23 tuting the nuisance sought to be abated are of greater value than $5,000.00; that the injury which will be done to complainants' lands by each of the defendants unless the nuisance is abated exceeds in value $5,000.00; and that the matter in controversy, exclusive of interest and costs exceeds $5,000.00.

Subpœnas to answer were issued, as prayed in the bill, and served upon the highest officer of each of the defendants to be found within this district.

Motion of the Tennessee Copper Company.

The Tennessee Copper Company, having entered
24 a special appearance for the sole purpose of objecting to the jurisdiction of the court, moved to dismiss the bill on the ground that as it appears upon its face that the complainants are citizens and residents of New York and West Virginia and said defendant a citizen and resident of New Jersey, and that neither the complainants nor said defendant are citizens and residents of the eastern district of Tennessee, this Court has no jurisdiction.

It is well settled that a want of jurisdiction apparent on the face of the bill may be taken advantage of by motion to dismiss. Coal Co. *v.* Blatchford, 11 Wall. 172; Central Trust Co. *v.* McGeorge,

151 U. S. 129, 132; Connor *v.* Vicksburg & M. R. Co., (C. C.) 36 Fed. 273; Municipal Inv. Co. *v.* Gardiner, (C. C.) 62 Fed. 954; Stichtenoth *v.* Central Exchange, (C. C.) 99 Fed. 1. 25

It is also clear, as is conceded by the complainants, that as the Act of March 3, 1875, Ch. 137, Sec. 1, as amended by the Act of August 13, 1888, Ch. 866, Sec. 1, 25 Stat. 433, provides that when the jurisdiction of the Circuit Court is founded only on the fact that the parties are citizens of different States, suit shall be brought only in the district where either the plaintiff or the defendant resides, and as neither the complainant nor the Tennessee Copper Company, a New Jersey Corporation, are residents of this district, if jurisdiction of this case depends upon diverse citizenship alone, the Circuit Court of this particular district is without jurisdiction, and such want of local jurisdiction not having been waived by said defendant, the suit as to it must be dismissed. Shaw *v.* Quincy Min. Co., 145 U. S. 444; Southern Pac. Co. *v.* Denton, 146 U. S. 202; *In re* Keasbey & Mattison Co., 160 U. S. 221; Western Loan Co. *v.* Mining Co., 211 U. S. 368. 26

The complainants contend, however, that jurisdiction of this suit does not depend upon diverse citizenship alone, but that it is an action relating to property which may be brought against said defendant in this district under Section 8 of the Act of March 3, 1875, Ch. 137, 18 Stat. 470, which provides that " when in any suit commenced in any Circuit Court of the United States to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real and personal property within the district where such suit is brought," any of the defendants shall not be an inhabitant of, or found within said district, or voluntarily appear, an order directing such absent defendant to appear and make defense may be served on him personally wherever found, or when this impracticable, by publication, 27

and that in default of such appearance, the court may entertain jurisdiction and proceed to the hearing and adjudication of such suit . . . ; but said adjudication shall, as regards said absent defendant . . . without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district.

This section of the Act of 1875 was not repealed by the Act of 1888, and remains in full force. Mellen *v.* Moline Works, 131 U. S. 352; Jellenik *v.* Huron Copper Co., 177 U. S. 1; Citizens Savings Co. *v.* Ill. C. R. Co., 205 U. S. 46, 54. And when the requisite diversity of citizenship exists to give the Circuit Court jurisdiction a suit embraced within the provisions of this section may be brought within the district in which the property is situated, although neither the plaintiff nor defendant is a resident of such district. Greely *v.* Lowe, 155 U. S. 58; Citizens Savings Co., *v.* Ill. C. R. Co., *supra;* Single *v.* Paper Mfg. Co., (C. C.) 55 Fed. 553; Spencer *v.* Stock-Yards Co. (C. C.) 56 Fed. 741.

The present suit does not, however, in my opinion come within the provisions of section 8 of the Act of 1875.

1. It clearly cannot be held to be within the provisions of this section under the broad theory upon which complainants rely that it is purely a local action *in rem* to abate a nuisance, wherein relief may be given without a judgment *in personam* against the defendants, through process of the court executed by its officers and operating directly on the *res*, and hence as such local action *in rem*, necessarily included within the provisions of said section 8.

In the first place, as the bill does not allege that either of the plants of the defendants, or any particular structures or appliances therein, constitutes a nuisance *per se*, which should be abated or destroyed under process of the court, but, in effect,

merely complains generally of an unlawful use of 31
the defendants' properties by methods of operating their plants which generate and diffuse noxious fumes and smoke over the complainants' properties, and, while it contains an incidental reference to an abatement of the nuisance by officers of the court, on the other hand avers specifically that an injunction to prevent the perpetration of the wrongs is the only adequate relief that complainants can secure, and prays for no specific relief other than an injunction operating upon the defendants *in personam* and restraining them from an improper use of their property, the suit, evidently, is not, under the pleadings, purely an action *in rem* to abate a nuisance, but is, on the contrary, primarily and 32
essentially an action to restrain a nuisance by injunctive relief operating *in personam* upon the defendants. Thus considered, it would follow that if the doctrine of York County Sav. Bank *v.* Abbot, (C. C.) 139 Fed. 988, 994—a case upon which complainants rely—that no jurisdiction is conferred upon the Circuit Court under section 8 of the Act of 1875 in an action where complete relief cannot be given according to the terms of the bill without a judgment *in personam* against an absent defendant, be correct, the court would clearly be without jurisdiction of the case.

And if jurisdiction under section 8 of the Act de- 33
pended upon whether the proceedings were essentially *in rem* or *in personam*, it might well be doubted whether the specific prayer for injunctive relief against the defendants could be disregarded, and the bill treated for jurisdictional purposes, under its broad averments and prayer for general relief, as merely one to abate a nuisance by process operating *in rem*, as distinguished from a suit to restrain the nuisance by process *in personam*. (See Mississippi & M. R. R. Co. *v.* Ward, 2 Black, 485: Van Bergen *v.* Van Bergen, 2 Johns, Ch. 272; Carlisle *v.* Cooper, 18 N. J. Eq., 241; Ramsay *v.* Chandler, 3 Col. 90; Lassater *v.* Garrett, 4 Baxt. (Tenn.),

34 369; 1 Am. & Eng. Enc. of Law, 2nd Ed. 64; 29 Cyc., 1209, 1252; 14 Enc. Pl. & Pr. 1146, 1147).

It is, however, unnecessary to determine this question, since even if the suit could thus be considered, in the aspect most favorable to the complainants, as an action to abate a nuisance under direct process of the court, and hence as purely a local action *in rem*, or in the nature of a proceeding *in rem*, this would not suffice to bring it within the provisions of section 8 of the Act of 1875.

It is clear that this section does not extend either to all suits of a local nature or to all local action *in rem* or in the nature of proceedings *in rem*, but is definitely limited to suits brought for the enforce-
35 ment of certain specific rights. The suits which it includes are not described by reference to their general character, but by reference to their object. It contains no general descriptive phrase, such as "suits of a local nature," used in sections 741 and 742 of the Revised Statutes in regard to suits brought in a State having more than one judicial district, or "proceedings *in rem*, or other like phrase; on the contrary it definitely enumerates the suits to which it relates, namely, those brought "to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property." In view of this specific enumeration of the suits to which it relates,
36 and the absence of any general phrase extending its provisions to any other actions, local or otherwise, its scope cannot be extended by any process of construction, there being nothing in its language upon which such extension can be based.

Where a "statute specifies certain classes of cases which may be brought against non-residents, such specification doubtless operates as a restriction and limitation upon the power of the court." Roller *v.* Holly, 176 U. S. 398, 406.

2. The question then arises whether, as the complainants further contend, this suit comes within

the specific provisions of section 8 of the Act of 1875, 37
as a suit brought to enforce a "claim to . . . property" of the defendants, within the meaning of this section, there being obviously no other class of suits enumerated in this section in which it can be included.

The suit clearly does not come within this provision merely because the complainants allege in their bill that by reason of the ownership of their lands they are "possessed of a right and claim in, to and against the lands and tenements of the defendants in the nature of an easement thereupon," this being the mere assertion of the legal conclusion which the complainants seek to draw from the fact of their ownership of the lands in Georgia; and it 38
cannot be held to come within this provision unless, upon the facts alleged in the bill, the complainants are seeking to enforce a right which, within the meaning of the Act, may properly be termed a "claim to property" within this district.

The theory of the complainants is, that attached to all property is a claim, based upon natural right, held by those who occupy any relation with respect thereto, that it shall not be used in such way as to injure or damage such other persons; and that the duty under which the defendants' property rests creates in favor of the complainants a right to and a claim against such property, which "may be called a negative right or easement upon land based 39
upon the maxim of *sic utere tuo ut alienum non lædas*," and is the basis of the present action.

There appears to be no direct adjudication upon the question whether a claim of this character may be properly considered a claim to property within the meaning of the statute.

The statement in Shainwald *v.* Lewis, (D. C.) 5 Fed. 310, 317, that by the words "legal or equitable lien or claim against real or personal property," Congress "intended to reach every case in which there should be any sort of charge upon a specific piece of property, capable of being enforced by a

40 court of equity," which is cited in 1 Rose's Code, Fed. Proc., sec. 856, note C, as authority for a similar statement, was purely *obiter*, the only point involved in the case being that Rev. Stat. sec. 738, in which these words originally occurred, did not apply to a suit in which the plaintiff sought to subject the general property of the defendant to the payment of its debts, but only to suits to enforce some pre-existing lien or claim upon a specific piece of property. Neither is the question controlled by the definition of the word "claim" given by Mr. Justice Story in Prigg *v.* Pennsylvania, 16 Pet. 536, 615, as "a demand of some matter as of right, made by one person upon another, to do or forbear to do
41 some act or thing as a matter of duty," this definition being given in a case involving the construction of a staute providing that slaves should be delivered up "on claim of the party" to whom their service was due; the meaning of the word "claim" as used in a statute of this character in reference to the "claim of" one person upon another to do a certain thing, being manifestly different from its meaning as used in the Act of 1875 in reference to the claim of one person "to the property of another. Evidently its meaning as used in the Act of 1875 in the phrase a "claim to . . . property," is much more nearly expressed by the next definition cited by Mr. Justice Story in this same opinion, as given by Lord Dyer in Stowel *v.* Zouch, 1 Plowd. 359, that
42 "a claim is a challenge by a man of the propriety or ownership of a thing, which he has not in possession, but which is wrongfully detained from him."

On the whole, I am of the opinion, that as it appears from the concluding portion of this section that it relates entirely to suits of which property is the "subject", and as the words "claim to . . . property" are evidently used in contrast to liens or incumbrances upon property and are the only words in the section under which a claim to the direct ownership of property may be included, these words relate only to claims made to the property in the

nature of an assertion of ownership or proprietary 43
interest, or other direct rights or claim to the property itself, such, for example, as the claim of ownership of an undivided interest in the property upon which a suit for partition may be based. (Greely *v.* Lowe, 155 U. S. 58, 74) and do not include the assertion of a right which is not based upon an interest in the property itself, but seeks merely to enforce a restriction which the law imposes upon the owner of the property in reference to its proper use; and therefore, that a bill to abate or restrain a nuisance is not a suit to enforce a claim to the defendant's property within the meaning of the statute.

"A nuisance is literally an annoyance and signi- 44
fies in law such a use of property or such a course of conduct as . . . transgresses the just restrictions upon use or conduct which the proximity of other persons or property in civilized communities imposes upon what would otherwise be rightful freedom." 21 A. & Eng. Enc. of Law, 2nd Ed. 682. The right to have a nuisance on another's property restrained or abated is not based upon an assertion of title to such property, or of any proprietary interest therein, or right or claim to the property itself, but is, on the contrary, based solely upon the breach of a personal duty which the owner of the property owes to his neighbor in its management and use; a breach of duty 45
which may be punished by indictment where the nuisance is of a public character, and which renders the offender personally liable in damages to the injured neighbor. And therefore the assertion by the neighbor of his right to have the nuisance restrained or abated, being based on the personal wrong and breach of duty on the part of the owner, and seeking merely to enforce the just restrictions which the law imposes upon him in the use of his property and prevent misuse, cannot, in my opinion, be regarded in any just sense as the assertion on the

46 part of the neighbor of a claim to the property itself within the meaning of the statute.

Nor can this result be changed by reason of the fact that as a suit for the abatement of a nuisance is a local action which can only be brought in the district where the nuisance is located (Mississippi & M. R. R. Co. *v.* Ward, *supra*), in such a suit between citizens of different States, where neither of the parties reside in the district where the nuisance is located, the action not being maintainable under section 8 of the Act of 1875, there is no jurisdiction in any Circuit Court of the United States except upon a waiver by the defendant of the want of jurisdiction in the particular district.

47 The construction and interpretation of statutes cannot extend to amendment or legislation. United States *v.* Fox, 3 Wall. 445, 448; Petri *v.* Greelman Lumber Co., 199 U. S. 487, 495. Nor can considerations of apparent hardship justify a strained construction of the law as written. Jos. Schlitz Brewing Co. *v.* United States 181 U. S. 584, 589; St. Louis & I. M. R. Co. *v.* Taylor, 210 U. S. 281. "The remedy," if any be required, "is in Congress." *Ex parte* Girard, 3 Wall. Jr. 263, 10 Fed. Cas. 436.

Furthermore the complainants are not on that account remediless; since in this case, as well as in the many other controversies between citizens of different States which Congress has not deemed
48 proper to include within the jurisdiction of the Circuit Courts of the United States, the parties may always rely for the enforcement of their rights upon the State courts having the necessary local jurisdiction.

It results, therefore, that the motion of the Tennessee Copper Company must be granted and the bill dismissed as to it, for want of jurisdiction over the person of the defendant; but without prejudice. Mason Grocery Co. *v.* Atlantic C. L. R. Co., U. S. Sup. Ct., January 17, 1910, York County Sav. Bank; York County Sav. Bank *v.* Abbot (C. C.), 139 Fed. 988. And without the adjudication of costs. The

Mayor *v.* Cooper, 6 Wall. 247; Hornthall *v.* The Col- 49
lector, 9 Wall. 560; Mansfield C. & L. M. Ry. *v.* Swann, 111 U. S 379; York County Sav. Bank *v.* Abbot, *supra.*

Motion of the Ducktown Sulphur, Copper & Iron Company.

The Ducktown Sulphur, Copper & Iron Company, hereinafter called the Ducktown Company, having also entered a special appearance, moved to dismiss the complainants' bill for want of jurisdiction and misjoinder of the parties defendant.

It is well settled, and is not disputed, that the requirement of section 1 of the Act of 1875, as amended 50
by the Act of 1888, that suits in a Circuit Court based upon diverse citizenship alone shall be brought within a district in which either the plaintiff or the defendant resides, has no application to suits brought against aliens, and that if jurisdiction otherwise exists in the Circuit Court, an alien corporation may be sued in any district in which valid service may be made upon it. *In re* Hohorst, 150 U. S. 653; Barrow Steamship Co. *v.* Kane, 170 U. S. 100.

The Ducktown Company urges, however, that there is nevertheless a want of jurisdiction in this Court and misjoinder of the defendants upon various grounds set forth in its motion to dismiss.

None of these grounds are, however, in my 51
opinion, well taken.

1. The fact that this bill is filed for the purpose of abating or restraining a nuisance affecting lands which lie wholly in the State of Georgia, does not require the action to be brought in the district where the injured property lies and thereby deprive this court of jurisdiction of the subject matter of the suit.

While an action to abate or restrain a nuisance is of a local nature and can only be maintained in a district having the proper territorial jurisdiction, the

52 venue of such action is in the district where the nuisance itself is located. 29 Cyc. 1237; 14 Enc. Pl. & Pr. 1106, and cases cited.

In Mississippi & M. R. R. Co. *v.* Ward, 2 Black, 485, 495 it was held, under a bill filed by a steamboat owner in the district court of Iowa to abate a bridge across the Mississippi River constituting an obstruction to navigation, that as to so much of the bridge as lay beyond the middle of the river and outside of the district of Iowa the court "had no power over the local object inflicting the injury" and was without jurisdiction.

And in Horne *v.* City of Buffalo, 49 Hun. 76, it was held under a statute providing that certain ac-
53 tions, including those for a nuisance, must be tried in the County where the cause of action, or some part thereof, arose, that a suit against a city to abate a nuisance, caused by the dumping of street sweepings and other foul matter into the river in the County where the city was located, which injured residents in a village below in another County, should be tried in the County in which the dumping was done, as being the County in which the cause of action arose. In this case the court said: "By the common law an action for a nuisance is regarded as local in its nature, and the venue is required to be laid in the County where the nuisance is situated."

It was also held in People *v.* St. Louis, 10 Ill. 352,
54 and Morris *v.* Remington, 2 Pars. Eq. Cas. 387, that the venue under a bill to restrain a nuisance by injunction is in the jurisdiction in which the nuisance is located; a result which would also seem to follow from the doctrine of Northern Ind. R. R. Co. *v.* Michigan Cent. R. R. Co., 15 How. 232, 242, that wherever the subject matter of a controversy is local, no jurisdiction attaches to a Circuit Court beyond the limit of the District in which the property is situated and no jurisdiction can be granted affecting such property, except in cases of contract, fraud or trust, where relief may be given by a decree *in personam.*

While none of these cases, except the Horne case, 55
presented the precise situation in the present case, where property constituting the nuisance lies in one district and the injured property in another, the reasoning in the Ward case that where the court "had no power over the local object inflicting the injury", its abatement was beyond the jurisdiction of the court, shows conclusively that the test of local jurisdiction in an action to abate a nuisance is the situs of the object inflicting the injury and not that of the object injured.

The various cases which hold that an action of tort seeking merely to recover damages caused by a nuisance, will lie in the jurisdiction where the injury is inflicted, although the object from which the in- 56
jury proceeds is located elsewhere—there being, however, much conflict of authority even on this point, as shown by the cases collated in 14 Enc. Pl. & Pr. 1106, notes 2 and 3—clearly involve an entirely different question from that in reference to the venue of an action to abate the nuisance itself. The "power over the local object inflicting the injury" which is requisite in an action to abate the nuisance is wholly unnecessary in an action merely to recover damages, whose result cannot in any way affect the maintenance of the nuisance itself; and the cases holding that in an action of tort for damages alone the venue should be laid where the injured object is located, may, 57
it seems, be well sustained by analogy to the rule stated in Northern Ind. R. R. Co. *v.* Michigan Cent. R. R. Co., *supra*, that an action for trespass *quare clausum fregit* cannot be prosecuted where the act complained of was not done in the district.

2. The fact that, so far as the bill shows, the defendants are separate and independent concerns, conducting each its own separate affairs, does not prevent the bringing of a joint action against them, or create a misjoiner of the Ducktown Company with its co-defendant.

58 Without determining whether, in accordance with the broad statement in 2 Street's Fed. Eq. Prac., Sec. 1344, p. 815, the defense of misjoiner of defendants can be made by motion to dismiss as well as by demurrer, in accordance with the usual practice, I think that the sound rule established by the great weight of authority, is, that in a suit to abate or restrain a nuisance, as distinguished from an action for damages, all persons maintaining structures or carrying on operations whose effect mingles and combines in contributing to the injury of the plaintiff's property, may be properly joined as defendants, although each transacts his own business separately and independently from the others. The
59 Debris Cases, (C. C.) 16 Fed. 25; Warren *v.* Parkhurst, 186 N. Y. 45; Kingsbury *v.* Flowers, 65 Ala. 479, People *v.* Ditch & Min. Co., 66 Cal. 138; Woodyear *v.* Shaefer, 57 Md. 1.

In Oakland *v.* Water Front Co., 118 Cal. 234, 248, in which it was held that a demurrer would lie for misjoiner, the structures maintained by the different defendants which it was sought to abate as an obstruction to navigation were not only entirely separate and independently maintained, but had obviously no joint or combined effect upon the navigation, the effect of each being entirely separate and distinct from that of the others.

60 3. The fact that the Tennessee Copper Company is not suable in this case, over its objection, does not require the dismissal of the suit as to the Ducktown Company.

It is well settled by the weight of authority that when jurisdiction otherwise exists in a Circuit Court in a suit against several defendants, who might be sued either separately or jointly, the right of one of the defendants to object to the local jurisdiction of the Court on the ground that it is brought in a district in which neither he nor the plaintiff resides, is a privilege personal to himself, which he alone can raise, and in his behalf only, and that

upon the dismissal of the suit as to him, upon his motion, where he is not an indispensable party to the suit, it will not be dismissed as to the remaining defendants properly before the Court. Benzinger Cash Reg. Co. *v.* National Cash Reg. Co., (C. C.) 42 Fed. 81; Smith *v.* Atchison T. & S. F. R. Co., (C. C.) 64 Fed. 1; Dominion National Bank *v.* Cotton Mills, (C. C.) 12 Fed. 181; Schiffer *v.* Anderson (C. C. A. 8th Cir.) 146 Fed. 457. 61

And jurisdiction of the suit will likewise be retained when although one of the defendants is a citizen of the same State with the plaintiff, whose presence would destroy the requisite diversity of citizenship, the suit has been dismissed as to him without prejudice, Smith *v.* Cotton Oil, (C. C. A. 5th Cir. 86 Fed. 459; or he has neither been served with process nor appeared. Doreman *v.* Bennett, 4 McLean, 224, 7 Fed. Cas. 691. Nor can a defendant served with process avail himself of a want of jurisdiction as to another person named in the writ who is severed from him and no longer to be considered a defendant in the case. Craig *v.* Cummings, 2 Wash. (C. C.) 505, Fed. Cas. 724. 62

Therefore, since each of the defendants in the present suit might have been sued severally as well as jointly (People *v.* Ditch & Min. Co., 66 Cal. 138) and under the averments of the bill the Tennessee Copper Company is clearly not an indispensable party to the relief prayed in reference to the nuisance alleged to exist upon the property of the Ducktown Company, the case may, under the foregoing authorities, be proceeded with against the latter Company, alone, although dismissed as to the former. 63

4. The fact, urged in argument, although not set out as one of the grounds of the motion to dismiss, that the plaintiffs, being citizens of New York and West Virginia, have sued two defendants, one of whom is a citizen of New Jersey and the other an alien corporation, does not deprive this court of jurisdiction.

64 Section 1 of the Act of 1875, as amended by section 1 of the Act of 1888, confers jurisdiction upon the Circuit Courts in suits "in which there shall be a controversy between citizens of different states . . . or a controversy between citizens of a State and foreign citizens." The plain object of this provision is to confer upon the Circuit Courts jurisdiction of all controversies between citizens of a State and citizens either of another State or a foreign nation, in which the requisite jurisdictional amount is involved, And while it may be said, from a somewhat metaphysical point of view, that in a suit brought by a citizen of one State against two defendants, one of whom is a citizen of
65 another State and the other an alien, the controversy, considered in its entirety, is neither wholly between citizens of different states nor between a citizen of a State and a foreign citizen, yet as such controversy in each and all of its elements as between the plaintiff and each of the defendants separately, clearly comes within the provisions of the Act the suit is not, under a just construction of the statute and in view of its plain intent, to be excluded from the jurisdiction of the Circuit Court merely because of the joinder of the two defendants in a single action.

To hold otherwise would, I think, be to give the language of the statute a strained and narrow con-
66 struction, not required by its letter, and defeating its manifest purpose of vesting in the Circuit Courts jurisdiction of controversies between three different classes of persons.

This view is in accordance with the clear weight of authority.

In Ballin *v.* Lehr, (C. C.) 24 Fed. 193, and Roberts *v.* Ry. & Nav. Co., (C. C.) 104 Fed. 577, affirmed in a carefully considered opinion in Roberts *v.* Ry. & Nav. Co., (C. C. A. 9th Cir.) 121 Fed. 785, in each of which the underlying question involved in determining the right of removal to the Circuit Court was whether the entire suit was one of which the Circuit Courts were given jurisdiction by sections 1 of

the Acts of 1875 and 1888, it was held that a suit 67
brought by a citizen of one State against two defendants, one of whom is a citizen of another State and the other an alien, is a suit of which the Circuit Courts are given jurisdiction, and which, as such, is removable to the Circuit Court on petition of the defendants. See also Rateau *v.* Bernard, 3 Blatchf. 242, 20 Fed. Cas. 305.

The case of Tracy *v.* Morel, (C. C.) 88 Fed. 801, in which the statement of a contrary doctrine, appearing in Black's Dillon on the Removal of Causes (sec. 84, p. 131)—which is not, however, found in the earlier editions of Dillon's Removal of Causes—is approved, without discussion, is clearly not supported by the cases of Hervey *v.* Illinois Mid. Ry. Co., 7 Biss. 103, 68
12 Fed. Cas. 60, and King *v.* Cornell, 106 U. S. 395, which are cited as stating the same rule. The Hervey case involved merely the obvious proposition that a suit could not be removed under the Act of 1875 on the ground of a separate controversy "wholly between citizens of different States" when it appeared that alien parties were also interested in the alleged separate controversy—there being, it is to be noted, no provision in that Act for the removal of a suit on the ground of a separate controversy between citizens of a State and aliens; and in King *v.* Cornell it was merely held that under the Act of 1875 an alien had no right of removal on the ground of a separate controversy. 69

I therefore conclude, both upon principle and the weight of authority, that a suit brought by a citizen of one State against a citizen of another State and an alien as defendants, involving the requisite jurisdictional amount, is within the jurisdiction of a Circuit Court of the United States.

Furthermore even if there had been originally a jurisdictional defect by reason of the joinder of the Tennessee Copper Company as a co-defendant with the Ducktown Company, this objection would, it seems, be cured, under the doctrine of Smith *v.* Cotton Oil Company and other cases hereinabove cited, by the dismissal of the suit against the Tennessee Copper Company, leaving in the suit merely a con-

70 troversy between citizens of New York and West Virginia as complainants and an alien corporation as defendant, of which a Circuit Court has undoubted jurisdiction.

5. The objection to the jurisdiction set out in the motion to dismiss in reference to the amount in controversy, has been cured by the amendments made in the bill.

No other objections being pointed out by the Ducktown Company's motion to dismiss, it results that the motion must be overruled.

An order will accordingly be entered dismissing the suit as to the Tennessee Copper Company in ac-
71 cordance with this opinion, and overruling the motion of the Ducktown Sulphur, Copper & Iron Company.

SANFORD,
Judge.

February 15, 1910.

Endorsed: Filed Feb. 16, 1910,
D. L. SNODGRASS, Clerk,
R. F. MCCLURE, D. C.

THE UNITED STATES OF AMERICA,
Eastern District of Tennessee,
Southern Division. } ss.

72 I, D. L. SNODGRASS, Clerk of the Circuit Court of the United States, within and for the District aforesaid, do hereby certify that the foregoing is a full, true and perfect copy of the original opinion on defendant's motions to dismiss bill as the same appears on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of said Court, at the City of Chattanooga, Tennessee, this 18 day of February A. D., 1910.

[SEAL.]

D. L. SNODGRASS Clerk.
R. F. MCCLURE Deputy.

Supreme Court of the United States

October Term, 1910

No. 495.

J. HARVEY LADEW, Et Al.
APPELLANTS

vs.

TENNESSEE COPPER COMPANY,
APPELLEE

Reply Brief on Behalf of Tennessee Copper Company

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Supreme Court of the United States

October Term, 1910

No. 868

J. HARVEY LADEW, Et Al.
APPELLANTS

vs.

TENNESSEE COPPER COMPANY,
APPELLEE

Reply Brief on the Part of Appellee, Tennessee Copper Company

Grouping the points of argument on behalf of appellants, we will deal with them under two headings.

Our argument in support of motion to dismiss the appeal is dealt with in a separate brief and will not be repeated here. We think it is a complete answer to the argument under point one of appellants' brief.

POINT ONE.

The present suit is not a local action, and even it it were, it is not within the purview of Section 8 *of the Act of* 1875, *relied on for jurisdiction in this case.*

The case of *Railroad v. Ward,* 2 *Black* (*U. S.*) 485, relied on by the appellants, is not in point. That was a proceeding to abate as a nuisance a portion of

a bridge across the Mississippi River. The structure itself constituted the nuisance and its removal was necessary to its abatement. A wholly different case is presented at bar. It could not be claimed upon the most technical and strained construction of the bill that the smelter and works of defendant constitute a nuisance; but the claim is that there is improper and negligent operation thereof.

A complete answer to this argument may be found in the prayer of the bill, which we quote from:

> "In consideration whereof, and forasmuch as your orators are remediless in the premises, and can have no adequate relief except in this Court; * * * * your orators pray that your honors may grant a writ of injunction properly restraining and enjoining the defendants and each of them, their officers, agents, servants and employees, from maintaining, operating, directing or permitting upon their land or premises the operation or maintenance of any oven, roast heap, pit, furnace or appliance generating or giving forth any of the smoke, gases, fumes or vapors hereinbefore complained of, or otherwise generating, producing or causing any foul or dense or copper or sulphurous smoke, or any noxious, poisonous, unhealthy or disagreeable, or in any manner injurious vapor, gas, fume or odor upon the territory or lands of your orators.
>
> "Your orators further pray that your Honors grant unto your orators a writ of injunction commanding the said defendants, the Ducktown Sulphur, Copper & Iron Company, (Limited) and the Tennessee Copper Company, and each of them, their agents, servants, employees and confederates, and all persons acting under their authority and control or direction, or under the direction, authority or control of either of them, to absolute-

ly desist and refrain from using, managing, maintaining, or in any manner operating any furnace, pit, oven or other appliance or copper reducing method causing, generating, giving off or discharging any dense or foul smoke, or noxious, poisonous, unwholesome or unpleasant gas, vapor, odor or fume upon the territory or lands of your orators, or from the generating, causing or diffusing any foul or dense smoke or any gas, vapor, odor or fume, damaging or destroying or injuring the property of your orators or causing or producing any physical or bodily harm, injury, discomfort, inconvenience to persons on or near the property and premises of your orators, or depriving your orators of pure air and sunlight, until such time as your Honors shall direct therein; and that upon the hearing hereof the writ herein prayed for be made and confirmed until the final determination of this suit, and that thereupon the injunction herein be made perpetual." (Record, pp. 16-17).

It will be observed that the gravamen of the bill is negligent and improper operation, and the burden of the prayer is for an injunction inhibiting and restraining the operation of the furnaces, smelters, etc., in the manner in which they are now being operated. Such a proceeding is not a local action.

A writ of injunction may be defined as a judicial process, operating *in personam*, and requiring the person to whom it is directed to do or refrain from doing a particular thing.

Joyce on Injunctions, Vol. 1, *p.* 4.
High on Injunctions, 4th Ed. Vol. 1, *p.* 2.
Jereney's Eq., p. 307.
Childress v. Perkins, Cooke (*Tenn.*) 88.

In the case of *Childress v. Perkins*, above cited,

the Supreme Court of Tennessee in 1812, in deciding the effectiveness of service in transitory actions, held:

> "The action is to follow the defendant; that is, it must be brought in the County where he is at the time it is brought; and a return of service by an officer of the County where the action is brought would be evidence that he is there. This being an injunction cannot alter the case, because we understand now that an injunction is a personal matter, and must as much follow the person of the defendant as any other kind of action."

The *American & English Enc. of Law, Vol.* 16, *p.* 342, defines an injunction as follows:

> "An injunction is a judicial process issuing out of a Court of Chancery, whereby a party is required to do or to refrain from doing a particular thing. The most ordinary form of injunction is that which operates to prevent the performance of an act. The other form of injunction commands that an act shall be done." *Citing authorities.*

Appellants do not distinguish between nuisances *per se* and those structures, lawful and harmless in themselves, which become nuisances by negligent or improper operation.

Joyce in his work on the Law of Nuisances, at section 12, says:

> "A nuisance per se, as the term implies, is a nuisance in itself, and which, therefore cannot be so conducted or maintained as to be lawfully carried on or permitted to exist. Such a nuisance is a disorderly house, or an obstruction to a highway or to a navigable stream. Again, nuisances per se have been defined to be such things as are nuisances at all times and under all circumstances, irrespective of location or surroundings."

Wood on nuisances, at *section* 77, *Vol.* 1, *3rd Ed.*, making the distinction between purpresture and nuisance, says:

> "A purpresture is any encroachment upon real property or rights and easements inci dent thereto belonging to the public, by an inclosure or erection thereon, which, if made upon the property of an individual, would be a tresspass. Lord Coke says: 'A purpresture signifies a close or enclosure; that is, when one encroacheth, and makes that several to himself which ought to be common to many.' By the early legal writers the term was used to designate encroachments upon the rights of individuals as well as upon the king; but it is now applied only to encroachments upon lands, or rights and easements therein belonging to the public, and to which the public have a right of access, or of enjoyment, and encroachment upon navigable streams, or the building of a house upon a public common, or enclosing a part of a highway with a fence, or erecting a curb or pier in a navigable stream, or building a bridge, or making any unauthorized erection over a highway. It was formerly held to be an injury to the public rights of a character above described which might be committed against and redressed at the suit of the public, the owner of the fee, or of individuals specially injured. But as has been previously stated, the term, as now used, is applied exclusively to encroachments upon public rights in highways, commons, or other lands owned or used by the Government or the public, and in navigable streams."

The distinction is made clear in *Barclay v. Commonwealth*, 25, *Penn.*, 503. The Court says (p. 505):

> "Where an erection or structure itself constitutes the nuisance, as where it is put up in

a public street, its demolition or destruction is necessary to the abatement of the nuisance; but where the offense consists in the wrongful use of a building, harmless in itself, the remedy is to stop such use."

But, even if this proceeding could be regarded as a proceeding *in rem* or a local action, this would not suffice to bring it within the provisions of the statute under consideration.

The opinion of the Court below so clearly states our position upon this point that we here quote the same:

"It is clear that this section does not extend either to all suits of a local nature or to all local actions in rem or in the nature of proceedings in rem, but is definitely limited to the suits brought for the enforcement of certain specific rights. The suits which it includes are not described by reference to their general character, but by reference to their object. It contains no general descriptive phrase, such as "suits of a local nature" used in section 711 and 742 of the Revised Statutes in regard to suits brought in a State having more than one judicial district, or "Proceedings in rem," or other like phrase; on the contrary, it definitely enumerates the suits to which it relates, namely: those brought to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property." In view of this specific enumeration of the suits to which it relates, and the absence of any general phrase extending its provisions to any other actions, local or otherwise, its scope cannot be extended by any process of construction, there being nothing in its language upon which such extension can be based.

"Where a statute specifies certain classes of cases which may be brought against non-

residents, such specification doubtless operates as a restriction and limitation upon the power of the Court." *Roller v. Holly*, 176 *U. S.* 389, 406. (Record, p. 27.)

It is no answer to argue, as is done under point Three of appellants' brief, that if the Court below has no jurisdiction of this character of case no Federal Court has. As was well stated by the Lower Court with respect to this matter:

> "Furthermore, the complainants are not on that account remediless; since in this case, as well as in the many other controversies between citizens of different States which Congress has not deemed proper to include within the jurisdiction of the Circuit Courts of the United States, the parties may always rely for the enforcement of their rights upon the State Courts having the necessary local jurisdiction." (Record, pp. 29-30.)

POINT TWO.

Complainants have no "legal or equitable lien upon, or claim to property" which they are seeking to assert in this case.

The bill in this case, after the formal parts, states that the complainants are the owners of certain lands in the Counties of Fannin, Gilmer and Pickens in the State of Georgia, and that the defendant, Tennessee Copper Company, is the owner of a furnace and smelting plant in the State of Tennessee, "within a short distance of the property, lands and forests of these complainants."

That portion of the bill relied on as alleging "lien upon, or claim to" property of the defendant is as follows:

> "Your orators show that by reason of their ownership of the lands and forests afore-

> said, and appurtenant thereto, your orators both in law and in equity are possessed likewise of a right and claim in, to and against the lands and tenements of the defendants in the nature of an easement thereupon that the same shall not be used in a manner to injure or destroy the said lands and forests of your orators adjacent thereto, as aforesaid." (Record, p. 13.)

We have already quoted the substantial portions of the prayer, as we view it.

That portion of the prayer relied on, which is merely by way of inducement to the main prayer, is as follows:

> "And that the nuisance now maintained, as aforesaid, upon the said properties of the defendants may be abated by and under the direction of this Honorable Court, through its own officers or otherwise, as it shall seem suitable and right; and that such changes shall be made by and under its direction in and to the properties of the defendants as shall prevent the discharge therefrom upon the lands and forests of your orators of the poisonous smoke, gases, vapors, etc., to the end that the defendants, and each of them, their officers, servants and employees may be restrained by injunction issuing out of this Court from doing, causing, directing, or in any manner aiding or abetting the acts hereinbefore complained of, or their continuance; your orators pray, etc."

These are the statements which are relied upon as setting up a lien upon, or claim to the property of the defendant. It could as well be claimed that every man has a lien upon or claim to personal property of his neighbor, that it be so used as not to injure him.

The statement of the Court below in its opinion

on this question is so clear that we beg to quote the same herewith as part of this argument.

> "The statement in *Shainwald v. Lewis*, (*D. C.*) 5 *Fed.*, 310, 317, that the words "legal or equitable lien or claim against real or personal property," Congress "intended to reach every case in which there should be any sort of charge upon a specified piece of property, capable of being enforced by a Court of Equity," which is cited in *I Rose's Code Fed. Prac., Sec.* 856, *Note C.* as authority for a similar statement, was purely obiter, the only point involved in the case being that Rev. Stat. Sec. 738, in which these words originally occurred, did not apply to a suit in which the plaintiff sought to subject the general property of the defendant to the payment of its debt, but only to suits to enforce some pre-existing lien or claim upon a specific piece of property. Neither is the question controlled by the definition of the word "claim" given by Mr. Justice Story in Prigg v. Pennsylvania, 16 Pet., 536, 615, as a "demand of some matter as of right, made by one person upon another, to do or forbear to do some act or thing as a matter of duty," this definition being given in a case involving the construction of a statute providing that slaves should be delivered "upon claim of the party" to whom their service was due; the meaning of the word "Claim" as used in a statute of this character in reference to the "claim of" one person upon another to do a certain thing, being manifestly different from its meaning as used in the Act of 1875 in reference to the claim of one person "to the property of another." Evidently its meaning as used in the Act of 1875 in the phrase a "claim to * * * property," is much more nearly expressed by the next definition cited by Mr. Justice Story in this same opinion, as given

by Lord Dyer in Stowel v. Zouch, 1 Plowd., 359, that "a claim is a challenge by a man of the property or ownership of a thing which he has not in his possession, but which is wrongfully detained from him.

"On the whole I am of the opinion, that as it appears from the concluding portion of this section that it relates entirely to suits of which property is the 'subject' and as the words 'claim to * * property' are evidently used in contrast to liens or incumbrances upon property and are the only words in the section under which a claim to the direct ownership of property may be included, these words relate only to claims made to the property in the nature of an assertion of ownership or proprietary interest, or other direct right or claim to the property itself, such, for example, as the claim of ownership of an undivided interest in the property upon which a suit for partition may be based, (Greely v. Lowe, 155 U. S., 58, 74) and do not include the assertion of a right which is not based upon an interest in the property itself, but seeks merely to enforce a restriction which the law imposes upon the owner of the property in reference to its proper use; and, therefore, that a bill to abate or restrain a nuisance is not a suit to enforce a claim to the defendant's property within the meaning of the Statute.

"A nuisance is literally an annoyance and signifies in law such a use of property or such a course of conduct as * * transgresses the just restrictions upon, use or conduct which the proximity of other persons or property in civilized communities imposes upon what would otherwise be rightful freedom." 21 Am. & Eng. Enc. of Law, 2nd Ed., 682. The right to have a nuisance on another's property restrained or abated

is not based upon an assertion of title to such property, or of any proprietary interest therein, or right or claim to the property itself, but is, on the contrary, based solely upon the breach of a personal duty which the owner of the property owes to his neighbor in its management and use; breach of duty which may be punished by indictment where the nuisance is of a public character, and which renders the offender personally liable in damages to the injured neighbor. And therefore, the assertion by the neighbor of his right to have the nuisance restrained or abated, being based on the personal wrong and breach of duty on the part of the owner, and seeking merely to enforce the just restrictions which the law imposes upon him in the use of his property and prevent misuse, cannot, in my opinion, be regarded in any just sense as the assertion on the part of the neighbor of a claim to the property itself within the meaning of the statute." (Record, pp. 28-29.)

It is too clear for argument, we think, that the statute under consideration has no reference to the assertion of a right not *coupled with an interest in the property*, or at least, a *claim of interest* in the property.

It is equally clear, we think, that there is neither assertion of interest nor of claim of interest in the property of defendant.

The form of the action negatives that idea.

No joint action can be maintained against two separate defendants, each owning separate lands, when the sole purpose of that action is to fix a legal or equitable lien upon or claim to respective properties of the defendants, unless there be an allegation that each defendant is interested in the title to the

lands of the other defendant. There is no such allegation in the bill in this cause.

Furthermore, there is no attempt to describe the lands of either defendant upon which the alleged lien is claimed except in the most general terms:

> "All of said lands of defendants are situated in said Polk County, in the State of Tennessee." (Record, p. 13.)

There could be no enforcement of a lien upon such a description.

We think we have shown that no jurisdiction attaches by virtue of any lien or claim to defendants' property. It is conceded that no jurisdiction would exist otherwise.

The Tennessee Copper Company is a resident of New Jersey, and the complainants are residents of New York and West Virginia.

Shaw v. Quincy Mining Co., U. S., 444.
Sou. Pac. v. Denton, 146, *U. S.*, 202.

All of which is respectfully submitted.

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Counsel for Appellee.

MARTIN H. VOGEL,
Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 868.

J. HARVEY LADEW *et al.*,
Appellants,

AGAINST

TENNESSEE COPPER COMPANY,
Respondent.

APPEAL FROM A DECREE OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE, ENTERED UPON AN OPINION OF HON. EDWARD T. SANFORD, *D. J.*, DISMISSING, FOR WANT OF JURISDICTION, AS AGAINST THE TENNESSEE COPPER COMPANY, A SUIT IN EQUITY ORIGINALLY BROUGHT AGAINST IT AND ANOTHER DEFENDANT, THE DUCKTOWN SULPHUR, COPPER & IRON COMPANY.

Statement of Facts.

This was a suit in equity to abate as a nuisance certain furnaces, smelters and ovens maintained, some by the defendant the Tennessee Company, and others by the defendant the Ducktown Company, in the Eastern District of Tennessee, to the

injury of some 18,000 acres of timber lands owned by the complainants in the counties of Gilmer, Fanning and Pickens in Georgia, contiguous to the boundary line between the two States. The complainants are citizens of New York and West Virginia. The Tennessee Copper Company is incorporated under the laws of the State of New Jersey; the Ducktown Company under the laws of Great Britain and Ireland. The smelting ovens of the two defendants are in close proximity, and from them quantities of sulphurous acid gas and other noxious vapors commingle and are discharged upon the lands of the complainants, to the irreparable injury of the timber growing thereon. It is unnecessary to set out the facts in further detail, as they were all brought to the attention of this Court in the previous case of the State of Georgia against the same defendants (206 U. S., 230). In that case, after consideration of the evidence adduced by the defendants as well as of the allegations of the complainants, this Court in May, 1907, ordered that, upon the application of the State of Georgia, an injunction to abate the nuisance should issue in October of that year. The State of Georgia has never seen fit to apply for this injunction which it sued for and obtained from this Court; and after waiting in vain until the following May for such an application to be made, this bill was then filed by the present complainants on their own behalf (fol. 21). Process was issued and served on the general manager of one defendant and the acting general manager of the other (fol. 23), each being actually engaged in carrying on business within the district. In July, 1908, a special appearance was entered by each defendant and a motion made by each to dismiss the bill as to it for want of jurisdiction (fols. 24–29).

The objection to the jurisdiction taken by the Tennessee Copper Company was that although there is the requisite diversity of citizenship, neither it nor the complainants are inhabitants of the district

in which the nuisance was maintained and the suit brought. The complainants' answer to this objection was that a bill in equity to abate a nuisance is a suit of a local nature, to enforce a claim against real property within the meaning of Section 8 of the Act of March 3rd, 1875, which can only be brought in the district in which the nuisance was situated and was properly brought there, the requisite diversity of citizenship existing, although the defendant was not an inhabitant of the district; since it might nevertheless, in case of its failure voluntarily to appear, be required to defend the action there by an order of the Court made under the provisions of that section.

These motions were argued before the Circuit Court in December, 1908 (fol. 29); but were not decided by it until February 15th, 1910 (fol. 48), after a delay of nearly fourteen months. The motion of the Ducktown Company, the alien corporation, was denied. That of the Tennessee Company, the New Jersey corporation, was granted, and as to it a decree entered in March, 1910, dismissing the bill and awarding it execution for its costs (fol. 51). A direct appeal to this Court from this decree was immediately allowed (fol. 56), the Court certifying that the decree of dismissal was based solely on the want of jurisdication of the person of that defendant. In May, 1910, upon the motion of the complainants, this Court advanced the appeal and ordered that it be heard at this Term of the Court. The defendant has since entered a motion to dismiss the appeal on the ground that as the decree dismissed the bill only as to the Tennessee Company and not as to the Ducktown Company, it is not a final decree from which an appeal will lie.

Assignment of Errors.

The ruling of the Circuit Court that it had not jurisdiction to entertain the bill and grant relief against the nuisances maintained by the Tennessee Company, is duly assigned for error (fol. 54).

FIRST POINT.

The decree dismissing the suit against the Tennessee Copper Company is a final decree from which an appeal will lie; and the motion of that defendant to dismiss the appeal should be denied.

The rule enforced in *Hohorst* v. *Hamburg-American Packet Co.*, 148 U. S., 262, and similar cases, that in a suit to enforce a joint liability against several defendants alleged to have co-operated and participated in the action complained of, a decree dismissing the suit as against one defendant only is not a final decree from which an appeal will lie, has no application to the facts of this case.

Whether under the allegations of the bill the two Copper Companies were properly joined as defendants in one suit, it is doubtless not material for this Court now to inquire; but if so, it is clearly not because the suit is brought to enforce any joint liability against them for acts in which they have co-operated to the injury of the complainants, but because although severally subject to a suit by the complainants to abate the separate nuisances severally maintained by each, they may nevertheless, chiefly for the reasons of convenience pointed out in the leading "*Debris*" case (16 Fed. Rep., 25), *Warren* v. *Parkhurst* (186 N. Y., 45), and similar cases, be joined as defendants in one suit where the only relief asked is the abatement of the several nuisances respectively maintained by each, and not any joint recovery of damages or the enforcement of any other common personal liability. The smelting ovens of these defendants are not jointly operated; neither of the companies is concerned with those of the other. The decree below is an absolutely

final determination that the complainants have no right which they can enforce, at least in this suit, against the smelting ovens alleged to be nuisances owned and maintained by the Tennessee Company. Whatever may be the determination hereafter as to the right of the complainants to have abated the ovens maintained by the Ducktown Company, as to whom the suit has been virtually severed, it can in no way concern the Tennessee Company. That is no longer a party to the suit for any purpose, has been finally dismissed from it and awarded execution for its costs. These facts assimilate the case at bar, not to the *Hohorst case*, but rather to cases like *Withenbury* v. *United States*, 5 Wall., 819, and *Hill* v. *Chic. & Evanston R. R. Co.*, 140 U. S., 52, and make entirely applicable to it the language of this Court in speaking of the decree in the latter case:

> "It dismissed the bill against several defendants for want of equity, and denied relief to the complainant upon all matters in controversy, except as to that amount [of one item claimed against certain defendants], and retained the case only as against the parties interested in that matter. The rights and liabilities of all the parties were in other respects determined. But there was no adjudication as to the payment of the amount to be ascertained by the master; that remained unsettled. It was, however, a severable matter from the other subjects of controversy, and did not affect their determination. The fact that it was not disposed of did not change the finality of the decree as to the defendants against whom the bill was dismissed; that amount, or to whom made payable, did not concern them. They were no longer parties to the suit for any purpose. The appeal from the subsequent decree did not reinstate them. All the merits of the controversy pending between them and the complainant were disposed of and could not be again reopened except on appeal from that decree."

Such was, in fact, the view of the Court below as to the nature of its own decree.

> "Therefore, since each of the defendants in the present suit might have been sued separately as well as jointly (*People* v. *Ditch Mining Co.*, 66 Cal., 138), and under the averments of the bill the Tennessee Copper Company is clearly not an indispensable party to the relief prayed in reference to the nuisance alleged to exist upon the property of the Ducktown Company, the case may under the foregoing authorities be proceeded with against the latter Company alone, although dismissed as to the former."

SECOND POINT.

A bill in equity to abate a nuisance is a local suit which can be brought only in the district in which the nuisance to be abated is situated.

This rule of law was long since settled in this Court by its decision in *Mississippi & Missouri R. R. Co.* v. *Ward*, 2 Black (U. S.), 485. There the complainant, in a bill in equity filed in the United States Court for the District of Iowa, had sued for and obtained a decree abating as a nuisance that portion of a bridge across the Mississippi River which was situated beyond the district of Iowa within the State of Illinois; and in this Court the decree was reversed upon the ground that a decree abating a nuisance can be granted only by a court having the *res* within its jurisdiction. The same rule of law in a case where the question was whether the suit must be brought before the Court having jurisdiction of the injured property, or before that having jurisdiction of the injuring property, was laid down by the Supreme Court of the

State of New York in *Horne* v. *City of Buffalo*, 49 Hun, 76. There the Court said:

> "In most instances the subject of a nuisance has a situs and is in some way or manner connected with or attached to the realty and is capable of a local description, so that the precept which may be issued by the Court to carry its judgment into effect may designate the object or structure which is to be abated by the officer to whom the precept is directed. By the common law an action for a nuisance is regarded as local in its nature, and the venue is required to be laid in the County where the nuisance is situated. *M. & I. N. Co.* v. *Douglas*, 2 East, 502; *Warren* v. *Webb*, 1 Taunt., 379; *Vt. & Mass. R. R. Co.* v. *Orcutt*, 16 Gray, 116; *Queen* v. *Cotton*, 102 Eng. Com. Law [1 Ellis & E.] 202."

THIRD POINT.

As a corollary to the previous Point it follows that unless the court below has jurisdiction to abate the nuisance maintained by this defendant, no Federal court has jurisdiction to do it, although the controversy is wholly between citizens of different States.

There is presumptive error in any construction of the Federal Statutes which leads to such a conclusion. No reason can exist for imputing to Congress an intention to exclude such a suit from its definition of suits of a local nature, which it has expressly provided may in cases of diverse citizenship be brought before the Federal Court having jurisdiction of the *res*, notwithstanding the fact that the defendant may not be an inhabitant of the jurisdiction.

Greely v. *Low*, 155 U. S., 67:

> By the Court, *Brown, J.:* "It has never been supposed that the Federal Courts did not have jurisdiction of local actions in which citizens of different states were defendants; and in fact provision was expressly made by law for such contingency."

The Court then proceeds to review the successive provisions made by Congress for jurisdiction in the Federal Courts of such local actions, beginning with Section 11 of the Judiciary Act of September 24, 1789, and ending with Section 5 of the Act of August 13th, 1888, in which, it is pointed out,

> "There was an express reservation of any jurisdictional right mentioned in Section 8 of the Act of Congress, of which this act was an amendment (that is, the Act of March 3, 1875), which, as above stated, is the section permitting suits to enforce any legal or equitable lien upon or claim to real estate to be brought in the district where the property lies, and defendants, non-residents of such district, to be brought in by publication or personal service made in their own district."

FOURTH POINT.

If a bill in equity to abate a nuisance maintained upon real property within the jurisdiction of the Court can fairly be described as a suit to enforce a claim to or against that property, there can be no question of the jurisdiction of the Federal court of the district in which the nuisance is situated to entertain the suit even as against a non-resident defendant.

U. S. R. S., Section 738 (Act of June 1, 1872):

> " When any defendant in a suit in equity to enforce any legal or equitable lien or claim against real or personal property within the district where the suit is brought, is not an inhabitant of nor found within the said district, and does not voluntarily appear thereto, it shall be lawful for the Court to make an order directing such absent defendant to appear, plead, answer or demur to the complainant's bill."

Act of March 3d, 1875, Section 8:

> " When in any suit commenced in any circuit court of the United States to enforce any legal or equitable lien upon, or claim to, or to remove any encumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the Court to make an order directing such absent defendant or defendants to appear, plead, answer or demur, by a day certain to be designated, which order shall be served on

such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property if any there be."

1 Rose's Code of Federal Procedure, Section 856 (Note *a*) (at page 798):

"Comparing the above provision of the Act of 1875 with R. S., Sec. 738, which was in general less elaborate and comprehensive in its terms, the following changes may be noted:

'*a.* The old provision was restricted to suits in equity, while this specifies 'any suit.'" * * *

"*c.* The old law referred to liens or claims 'against' property within the district. The new law includes suits to enforce a 'claim to' property, which is a very different thing."

"*d.* The class of cases in which substituted service is permitted, is also further increased in the new law by the inclusion of suits 'to remove any incumbrance or lien or cloud upon the title to property.'" * * *

"It (the act in question) does not, of course, change or abolish the requirement of diversity in cases where jurisdiction is dependent upon the citizenship of the parties. The cause must still be one of which the Court has jurisdiction either by diverse citizenship or because of a Federal question. *It merely creates an exception to the general rule limiting civil suits to the district wherein a person is inhabitant. If a case is within its terms, it is not necessary that either party be a resident of the district where suit is brought.* Indeed, it is essential that the defendant to be served 'shall not be an inhabitant of or person within' the district. The section applies where there is only one defendant, as well as to cases where there are more (*Dick* v. *Foraker*, 155 U. S., 404)."

FIFTH POINT.

A bill in equity to procure the abatement of a nuisance which is not only upon but is itself real property within the jurisdiction of the Court is, within the precise letter and spirit of the Statute, a suit to enforce a claim to or against real property within the district.

If the proposition be not self-evident, it may perhaps be fortified by some analysis of the nature both of the right conferred by law upon the owner of real property to or against an adjoining piece of land upon which a nuisance is maintained to the detriment of his own property, and of the remedy afforded him. His right is to have the offending structure upon his neighbor's land destroyed, if need be, or such other alteration worked upon that land as shall prevent the continuance of the nuisance. His remedies are at least threefold. One is the right to enter himself upon his neighbor's land without process of law and without liability for trespass (if he avoid a breach of the peace), and there upon his neighbor's land himself with his own hands abate the nuisance.

> "If H builds a house so near mine that he stops my light and shoots the water upon my house, or is in any other way a nuisance to me, I may enter upon the owner's soil and pull it down."
>
> *Rex* v. *Rosewell*, 2 Salk, 459, and cases *passim*, cited under "Abatement of Nuisances," 1 Amer. & Eng. Ency. of Law, pp. 63, 79, *et seq.*

A second remedy is to file a bill in equity to abate the nuisance; in which case, if the bill be sustained, the Court, besides the personal injunction against

the maintainers of the nuisance, which it may or may not grant, will enjoin the nuisance itself, and send its own officers upon the defendant's property to abate it.

People v. *Gold Run Ditch & Mining Co.*, 66 Cal., 138:

> By the Court: "It is the nuisance itself which, if destructive of public or private rights of property, may be enjoined. * * * Accompanying the ownership of every species of property is a corresponding duty to so use it that it shall not abuse the rights of other recognized owners."

People v. *Vanderbilt*, 26 N. Y., 287:

> By the Court: "The only remaining objection is to the form of the judgment, which, it is said, should not have directed the defendant himself to remove the crib, but should have left this to be done by the proper officer. This objection, if well taken, would not warrant an appeal to this Court, but the error should have been corrected in the Court below on motion; but the judgment, although not in the usual and most approved form, is, we think, not objectionable."

Horne v. *City of Buffalo*, 49 Hun, 76, *supra:*

> By the Court: "In most instances the subject of a nuisance has a situs, and is in some way or manner connected with or attached to the realty, and is capable of a local description, so that the precept which may be issued by the Court to carry its judgment into effect may designate the object or structure which is to be abated by the officer to whom the precept is directed."

A third remedy, if the nuisance be common to the complainant and the public, is a criminal prosecution, in which case the judgment on conviction may embrace, in addition to the punishment, an order for the abatement of the nuisance (1 Amer. & Eng. Ency. of Law, 2nd Ed., p. 76).

The complainant in a suit to abate a nuisance is, therefore, necessarily asserting nothing less than a right or claim to or against the real property upon which it exists, and a part of which it is; to wit, to enter upon the land either by himself or through officers of the law, and without regard to the presence or absence of its owners, there to work such alterations upon it as shall be necessary to prevent further interference from it with the condition in which he is entitled to have his own property maintained. Such a right is no less a right or claim to or against real property than a right conferred by express covenant in a deed to restrict in any other way the free use of it; and a suit to enforce either right cannot be refused recognition as a suit to enforce a claim to or against real property without doing violence, altogether unjustified, to the English language. It can have been only a failure of the complainants to make clear to the Court below this essence of the right and of the remedy to enforce it which led that Court to the contrary conclusion, reached by reasoning expressed as follows in its opinion (fol. 39):

> " The right to have a nuisance on another's property restrained or abated is not based upon an assertion of title to such property or of any proprietary interest therein or right or claim to the property itself, but is, on the contrary, based solely upon the breach of a personal duty which the owner of the property owes to his neighbor in its management and use; a breach of duty which may be punished by indictment, where the nuisance is of a public character, and which renders the offender personally liable in damages to the injured neighbor. And therefore the assertion by the neighbor of his right to have the nuisance restrained or abated being based on the personal wrong and breach of duty on the part of the owner, in seeking merely to enforce the just restrictions which the law imposes upon him in the use of his property and prevent misuse, cannot in my

> opinion be regarded in any just sense as the assertion on the part of the neighbor of a claim to the property itself within the meaning of the statute."

On the contrary, it is respectfully submitted, the right to put a stop to a nuisance suffered to exist upon one's neighbor's land, concerns itself with the owner of the land not at all, and it is enforced by the complainant himself or by the Court through its officers against the land itself, irrespective of the presence or absence of its owner, against whom, if he be present, an incidental injunction may likewise go to prevent his interference with a direct decree of the Court against his property; or, if the Court chooses, as it need not but may, to make him its own instrument for the enforcement of its decree, a direct injunction to that end. Any other view of the law would appear to leave every court of equity, whether State or Federal, helpless to abate a nuisance though existing before its very doors, if the owner of the property should avoid or refuse to come within its jurisdiction.

It has been said that there is nothing to justify a refusal to give to the words of the statute their due and ordinary significance. On the contrary, they are peculiarly entitled to it because of the necessity Congress was under in framing the language of this statute to avoid the more general phrase "suits of a local nature," employed by it in other statutes where that phrase could be properly used, and about the inclusiveness of which there could have been no dispute. Thus in U. S. R. S., Section 741 (Act of May 4, 1858), where Congress was providing for personal service upon the defendant if within the State though without the District, it properly used the phrase "in suits of a local nature." But in U. S. R. S., Section 738 (Act of June 1st, 1872), and the Act of March 3, 1875), Section 8 (quoted *supra*), it was the purpose of Congress to confer jurisdiction of that particular class

of "suits of a local nature" in which the local court could administer the remedy to which the complainant might be entitled, without personal service of process upon the defendant, and therefore without granting personal relief against him. Here Congress could not have used the words "suits of a local nature" without conferring jurisdiction as against absent defendants of local actions *in personam*, *e. g.*, an action of trespass *q. c. f.* This is as purely a suit of a local nature as one to abate a nuisance, and yet is *in personam*, resulting only in a judgment for damages against the defendant. It was for the purpose of excluding such local actions *in personam*, and not with the intention of excluding any local action *in rem*, like an action to abate a nuisance, that the language in question was adopted; as clearly appears from the language of its concluding provision, that the adjudication to be made by the Court in such a suit

> "shall, as regards that absent defendant or defendants, without appearance, *affect only the property which shall have been the subject of the suit and under the jurisdiction of the Court* therein within such district."

It must be, therefore, that the test whether a local action comes within the purview of the language of the Act or not, is whether the relief required can be given without a judgment *in personam* against an absent defendant; and such was the test applied by Judge Putnam, of the Circuit Court for the District of Maine, in *York County Savings Bank* v. *Abbott*, 139 Fed. Rep., 988.

SIXTH POINT.

The bill in the present suit is one to procure the abatement of a nuisance upon real property and itself real property within the jurisdiction of the Court, and therefore one of which the Court has jurisdiction.

The bill alleges that the complainants are the owners of some 18,000 acres of timber land, and that the timber upon it is being rapidly destroyed by poisonous gases discharged from furnaces, smelters and ovens erected, all in Polk County, Tennessee, within the jurisdiction of the Court below, some upon land owned and occupied by the Ducktown Company, others upon land owned and occupied by the Tennessee Company. It makes the specific allegation that

> "By reason of their ownership of the lands and forests aforesaid and appurtenant thereto, your orators, both in law and in equity, are possessed likewise of a right and claim in, to and against the land and tenements of the defendants in the nature of an easement thereupon that the same shall not be used in a manner to injure or destroy the said lands and forests of your orators adjacent thereto as aforesaid" (fol. 12);

and that

> "Your orators are without remedy in a court of law, and unless relief is granted as herein prayed your orators will suffer irreparable damage and injury."

And the direct abatement of the nuisance by the officers of the Court is specifically prayed for as follows (fol. 18):

> "That the right and claim of your orators as aforesaid to and upon said properties of the

> defendants, that the same shall not be used by them in a manner to destroy or injure the lands and forests of your orators, may be declared and enforced, *and that the nuisance* now maintained as aforesaid upon the said properties of the defendants *may be abated by and under the direction of this Honorable Court through its own officers* or otherwise as [to] it shall seem suitable and right, and that such changes shall be made by and under its direction in and to the properties of the defendants as shall prevent the discharge therefrom upon the lands and forests of your orators of the poisonous smoke, gases, vapor and other deleterious substances hereinbefore complained of."

In the face of these allegations and this prayer for relief, it would appear futile to deny that the Court below had before it a bill in equity for the abatement of a nuisance under which it was authorized and required to exercise the jurisdiction it possessed, even if the defendants should refuse to appear, to abate the nuisance by an adjudication which, in the language of the statute, should "affect only the property which shall have been the subject of the suit, and under the jurisdiction of the Court therein within such district." None of the criticisms to which the bill has been subjected by the defendants or by the Court below affect the validity of this conclusion.

1. It is said that the bill prays also for a personal injunction against the defendants. This is true. But, as has been seen, no such injunction is necessary to enable the Court to deal adequately with the situation presented. On the other hand, it may appropriately issue if the defendants shall elect to appear; and a prayer for it was therefore properly inserted in the bill; which the pleader was not required to frame solely upon the assumption that the defendants would choose to allow it to be taken against them *pro confesso*.

2. It is also said that the bill alleges that an injunction to prevent the perpetration of the wrongs complained of "is the only adequate relief the complainants can secure." This is also true (fol. 17).

If the statement of this conclusion of law be construed to mean only an injunction *in personam* against the defendants, it is doubtless a blunder on the part of the pleader; since the direct process of the Court to its own officers to abate the nuisance is all that the complainants need. But it cannot be the law that complainants, otherwise showing a case for relief which the Court has jurisdiction to give and which they elsewhere duly demand, are to be turned out of court and deprived of all relief simply because the pleader has elsewhere erroneously stated as a conclusion of law that certain other relief is what they need.

Moreover, as has been seen, *supra*, there is respectable authority (*People* v. *Gold Run Ditch & Mining Co.*, 66 Cal., 138), for saying that "It is the nuisance itself which, if destructive of public or private rights of property, may be enjoined."

The process of the Court enjoining its officers to abate the nuisance might, therefore, well be described itself as an injunction; and it might well be argued, if the question had any materiality in any aspect, that such was the injunction which the pleader had in mind in the allegation in question.

3. It is said by the Court below (fol. 35) that

> "The bill does not allege that either of the plants of the defendants, or any particular structures or appliances therein, constitute a nuisance *per se* which should be abated or discharged under process of the Court; but in effect merely complains generally of an unlawful use of the defendants' properties by methods of operating their plants which generate and diffuse noxious fumes and smoke over the complainants' properties."

With great respect it is submitted that the language of the bill is not justly subject to this criti-

cism. The bill alleges that upon the lands occupied by each of the defendants in Polk County there have been erected a number of furnaces, smelters and ovens from which are discharged vast quantities of smoke, sulphur fumes and noxious and poisonous vapors upon the lands of the complainants, whereby the forests thereon are slowly but surely being destroyed (fols. 12-14); that already the State of Georgia has without avail "made demand on said defendants for an abatement of the nuisances herein sought to be enjoined" (fol. 17), and specifically prays "that the nuisance now maintained as aforesaid upon the said properties of the defendants may be abated by and under the direction of this Honorable Court, through its own officers or otherwise, as to it shall seem suitable and right, and that such changes shall be made by and under its direction in and to the properties of the defendants as shall prevent the discharge therefrom upon the lands and forests of your orators of the poisonous smoke, gases, vapors," etc. (fol. 18).

Under these allegations of fact it must here be taken as true that these furnaces, smelters and ovens, emitting gases which destroy the timber upon the adjacent lands, are, as a matter of law, nuisances; and, if the added stigma of the Latin words be of any moment as in this connection it is not, nuisances *per se;* which the Court has jurisdiction to abate through its own officers, if need be, in the precise manner prayed.

Campbell v. *Seaman*, 63 N. Y., 568.
St. Helens Smelting Co. v. *Tipping*, 11 H. L. Cases, 642.
American Smelting & Ref'g Co. v. *Godfrey*, 158 Fed. Rep., 225.

Having stated the facts, the pleader is to be commended, rather than criticised, for refraining from encumbering his bill with his own theories of the law which should be applied to them by the Court to whom he sues.

4. Finally the suggestion was made below, not by the Court but by the defendants, that the offending furnaces, smelters and ovens might be operated in such a way that there would be no emission from them of noxious gases, etc., and that, therefore, the Court cannot abate them as nuisances or grant the complainants any relief with regard to them, unless the defendants shall choose to submit themselves to a personal injunction admonishing them to mend their ways.

There is and can be in the absence of an answer to the bill no evidence of this alleged fact; and if it were an established fact the supposed conclusion of law would not follow from it. Confronted with ovens emitting noxious gases, a court of equity, when asked to abate them as a nuisance, is not, when their owner refuses to answer but abandons them to their fate, obliged to stay its hand until it shall institute a scientific inquiry to ascertain whether there may not be other means and processes which if the defendant had chosen to learn and adopt he might have used his ovens without the emission of noxious gases from them. The Court is concerned with things as they are; and if as they are they are a nuisance, to abate it in the most convenient way. If there be other means short of a cessation of the operation of the nuisance which might yet afford the complainants adequate relief, it is for the defendant to submit itself to the jurisdiction of the Court, and by its answer point out the better way, and ask for its adoption.

"The course now generally adopted is, where an injunction is sought to restrain a business establishment which is not *per se* a nuisance but which has only become so by the manner in which it is conducted, *if the answer discloses* that the results can be remedied by scientific and skillful appliances, to hold the bill until such appliances can be tested and the results ascertained" (Wood's Law of Nuisances, Sec. 823).

LAST POINT.

The motion to dismiss the appeal should be denied, the decree of the Circuit Court should be reversed, and the cause remitted to it with instructions to proceed to a hearing and adjudication of the suit, pursuant to the provisions of the statute.

Respectfully submitted,

HENRY B. CLOSSON,
Of Counsel for Appellants.

LADEW *v.* TENNESSEE COPPER COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

No. 495. Argued October 19, 1910.—Decided November 28, 1910.

Plaintiffs, citizens of States other than that of the defendant, brought suit against the defendants in the Circuit Court of the United States for a district of which neither plaintiffs nor this defendant were inhabitants to compel defendants to abate a nuisance carried on in that district and which was causing damage to plaintiffs' property in another State and in which neither they nor the defendant resided; the Circuit Court dismissed as to this defendant for want of jurisdiction, neither it nor the plaintiffs being inhabitants of that district. In affirming judgment *held* that:

Diversity of citizenship—nothing more appearing—will not give the Circuit Court jurisdiction to render judgment *in personam* where neither plaintiff nor defendant is an inhabitant of the district in which the suit is brought and the defendant appears specially and objects to the jurisdiction.

The jurisdiction given to the Circuit Court by § 8 of the act of March 3, 1875, c. 137, 18 Stat. 470, of suits to enforce legal or equitable claims to real or personal property within the district, even if the parties are not inhabitants of the district, does not extend to suits

to compel the owner of real estate in the district to abate a nuisance maintained thereon. Such a cause of action is not a claim or lien upon the property.

The jurisdiction of the Circuit Courts is determined by acts of Congress enacted in pursuance of the Constitution, and even if the jurisdiction already granted can be extended by Congress, those courts cannot, until such legislation is enacted, exercise jurisdiction not yet conferred upon them.

179 Fed. Rep. 245, affirmed.

THE facts, which involve the jurisdiction of the Circuit Court, are stated in the opinion.

Mr. Henry B. Closson, with whom *Mr. Charles Seymour*, *Mr. Charles H. Sheild* and *Mr. Benjamin F. Washer* were on the brief, for appellants:

The decree dismissing the suit against the Tennessee Copper Company is a final decree from which an appeal will lie. *Hohorst* v. *Hamburg-American Packet Co.*, 148 U. S. 262, distinguished, and see *Withenbury* v. *United States*, 5 Wall. 819; *Hill* v. *Chicago & Evanston R. R. Co.*, 140 U. S. 52.

A bill in equity to abate a nuisance is a local suit which can be brought only in the district in which the nuisance to be abated is situated. *Mississippi & Missouri R. R. Co.* v. *Ward*, 2 Black, 485; *Horne* v. *Buffalo*, 49 Hun, 76.

Unless the court below has jurisdiction to abate the nuisance maintained by this defendant, no Federal court has jurisdiction to do it, although the controversy is wholly between citizens of different States. *Greely* v. *Low*, 155 U. S. 67.

If a bill in equity to abate a nuisance maintained upon real property within the jurisdiction of the court can be described as a suit to enforce a claim to or against that property, there can be no question of the jurisdiction of the Federal court of the district in which the nuisance is situated to entertain the suit even as against a non-

resident defendant. Rev. Stat., § 738; Act of March 3, 1875, § 8; 1 Rose's Code of Fed. Proc., § 856, note *a*, p. 798; *Dick* v. *Foraker*, 155 U. S. 404.

A bill in equity to procure the abatement of a nuisance which is not only upon but is itself real property within the jurisdiction of the court is, within the precise letter and spirit of the statute, a suit to enforce a claim to or against real property within the district. *Rex* v. *Rosewell*, 2 Salk. 459, and cases *passim*, cited under "Abatement of Nuisances," 1 Amer. & Eng. Ency. of Law, pp. 63, 79 *et seq.*; *People* v. *Gold Run Mining Co.*, 66 California, 138; *People* v. *Vanderbilt*, 26 N. Y. 287; *Horne* v. *Buffalo*, 49 Hun, 76; 1 Amer. & Eng. Ency. of Law, 2d ed., p. 76.

The test whether a local action comes within the purview of the language of the act or not, is whether the relief required can be given without a judgment *in personam* against an absent defendant. *York County Savings Bank* v. *Abbott*, 139 Fed. Rep. 988.

The bill in the present suit is one to procure the abatement of a nuisance upon real property and is itself a claim against real property within the jurisdiction of the court, and therefore one of which the court has jurisdiction.

Under the allegations of fact it must here be taken as true that these furnaces, smelters and ovens, emitting gases which destroy the timber upon the adjacent lands, are, as a matter of law, nuisances which the court has jurisdiction to abate through its own officers, if need be, in the manner prayed. *Campbell* v. *Seaman*, 63 N. Y. 568; *St. Helens Smelting Co.* v. *Tipping*, 11 H. L. Cases, 642; *American Smelting Co.* v. *Godfrey*, 158 Fed. Rep. 225.

Mr. John H. Frantz, with whom *Mr. Howard Cornick* and *Mr. Martin Vogel* were on the brief, for appellee:

The appeal is premature, and, therefore, the court is without jurisdiction to hear and determine the same. *Hohorst* v. *Hamburg-American Packet Co.*, 148 U. S. 262;

Hill v. *Chicago & Evanston R. R. Co.*, 140 U. S. 52, distinguished, and see *Bank of Rondout* v. *Smith*, 156 U. S. 330; *Ex parte National Enameling Co.*, 201 U. S. 160.

The gravamen of the bill is negligent and improper operation, and the burden of the prayer is for an injunction inhibiting and restraining the operation of the furnaces, smelters, etc., in the manner in which they are now being operated. Such a proceeding is not a local action.

A writ of injunction may be defined as a judicial process, operating *in personam*, and requiring the person to whom it is directed to do or refrain from doing a particular thing. 1 Joyce on Injunctions, p. 4; 1 High on Injunctions, 4th ed., 2; Jereney's Eq., p. 307; *Childress* v. *Perkins*, Cooke (Tenn.), 2; 16 Amer. & Eng. Ency. of Law, 342; Joyce on Law of Nuisances, § 12; 1 Wood on Nuisances, 3d ed., § 77; *Barclay* v. *Commonwealth*, 25 Pa. St. 503.

Even if this proceeding could be regarded as a proceeding *in rem* or a local action, this would not suffice to bring it within the provisions of the statute under consideration. *Roller* v. *Holly*, 176 U. S. 389, 406.

Complainants have no legal or equitable lien upon or claim to property which they are seeking to assert in this case. The statute under consideration has no reference to the assertion of a right not coupled with an interest in the property, or at least, a claim of interest in the property.

No joint action can be maintained against two separate defendants, each owning separate lands, when the sole purpose of that action is to fix a legal or equitable lien upon or claim to respective properties of the defendants, unless there be an allegation that each defendant is interested in the title to the lands of the other defendant. There is no such allegation in the bill in this cause.

There could be no enforcement of a lien upon such a description of land as in the bill. No jurisdiction attaches

by virtue of any lien or claim to defendants' property. It is conceded that no jurisdiction would exist otherwise. The Tennessee Copper Company is a resident of New Jersey, and the complainants are residents of New York and West Virginia. *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444; *So. Pac. Co.* v. *Denton*, 146 U. S. 202.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action in equity was brought by the present appellants, citizens of New York and of West Virginia, against the appellees, the Tennessee Copper Company, a corporation of New Jersey, and the Ducktown Sulphur, Copper and Iron Company, Limited, a British corporation—each of those corporations having its chief office and place of business in Polk County, Tennessee, within the territorial jurisdiction of the Circuit Court.

The business of each defendant is the mining, manufacturing and producing of copper and sulphur ores and products. The plaintiffs are the joint owners in fee and in possession of more than 6,000 acres of land in Fannin, Gilmer and Pickens Counties, Georgia, and have the timber rights in other lands, exceeding 18,000 acres, in the same counties, just beyond the boundary line between Tennessee and Georgia. All these lands are devoted to forestry, have been and are of the greatest value, and contain various kinds of valuable trees. The plaintiffs employ the forests in the production of timber and bark. But for the acts of the defendants, as hereinafter stated, the lands would be sufficient to afford a continuous supply of lumber and bark in large quantities and for an indefinite period in the future. The lands have upon them forests and trees of different growth, which must receive attention and treatment in order to meet the future needs of forestry and bark industry. Before the commission by the defendants of the acts complained of the

forest and timber rights and holdings of plaintiffs approached $100,000 in value, and the damage alleged to be committed by the defendants will exceed $50,000.

The defendants conduct their business in Tennessee within a short distance of plaintiffs' lands. Recently, before the bringing of this action, the defendants erected, or caused to be constructed, and still own, operate and control furnaces, smelters and ovens, all in close proximity to one another, upon lands owned or leased by them in Polk County, Tennessee. In view of those facts the plaintiffs allege that both in law and equity they are possessed of "a right and *claim in, to* and against the lands and tenements of the defendants in the nature of an easement thereupon that the same shall not be used in a manner to injure or destroy the said lands and forests [in Georgia] of your orators adjacent thereto as aforesaid. But the defendants, by means of said furnaces, smelters and ovens maintained by them upon their lands as aforesaid, and in other ways, are, and for some time past have been, generating and causing to be discharged into the atmosphere, vast quantities of smoke, sulphur fumes and noxious and poisonous vapors and gases and other deleterious substances. Within a short distance from the works and property of the defendants the said smoke, fumes, vapors and gases and other deleterious substances so generated by each respectively inextricably mingle and are together discharged upon the lands and forests and trees of your orators, and as a result thereof great damage has been done and injury is threatened as hereinafter appears."

The plaintiffs further allege that said fumes, gases and vapors have already destroyed a considerable portion of their forests and trees; that unless they receive the relief asked their entire holdings will be destroyed, and their property and interests rendered valueless; that such fumes, gases and vapors have descended upon

plaintiffs' forests and trees, killing the trees and ruining the timber; that the destruction so created and produced is constantly increasing in extent, and includes forests and trees of every variety and species, and in all stages of growth and development; that the taller trees that serve to protect the smaller growth have been the first to suffer damage and destruction; that the enlargement of the zone of destruction is due to the fact that the death of the trees already brought about permits the smoke, fumes, gases and vapors that are constantly increasing in quantity to travel farther before being absorbed; that the forests and timber, destroyed as stated, would have made good lumber, railroad ties, and tanbark, and could have been utilized for purposes of trade and commerce; and that the acts of the defendants, unless restrained by the court, will destroy all the forests, old and young, as well as the timber and bark rights of the plaintiffs.

The bill also alleges that the smoke, fumes, gases and vapors so generated and discharged on the property of the plaintiffs will destroy all forms of plant and tree life, including vegetables, crops, grasses and orchards; that by such destruction the soil loses all moisture and compactness, and, being washed away by the rains, the remaining part of plaintiffs' lands will be rendered bare and barren; that the smoke, fumes, gases and vapors are unwholesome and injurious to the life and health of all coming in contact with them, and render the lands unfit for occupancy; and that the plaintiffs, as well as the Bureau of Forestry of the United States, have frequently demanded that defendants abate the above nuisance, but the latter have refused to obey such demand, leaving plaintiffs no other alternative except to seek an injunction to prevent the above wrongs.

The specific relief asked is a decree that the defendants shall not use their property in Tennessee so as to destroy

or injure the plaintiffs' lands and forests in Georgia; that the alleged nuisance maintained by defendants be abated under the direction of the court through its own officers or otherwise as shall seem suitable and right; and that the defendants be enjoined "from maintaining, operating, directing or permitting upon their land or premises [in Tennessee] the operation or maintenance of any oven, roast heap, pit, furnace or appliance generating or giving forth any of the smoke, gases, fumes or vapors hereinbefore complained of, or otherwise generating, producing or causing any foul or dense or copper or sulphurous smoke, or any noxious, poisonous, unhealthy or disagreeable, or in any manner injurious vapor, gas, fume or odor upon the territory or lands of your orators" [in Georgia].

Such was the case made by the plaintiffs' allegations in their bill.

The summons was served in Polk County, Tennessee, on the General Manager of the Tennessee Copper Company, the highest officer of that corporation; on the British corporation, by leaving a copy with its Acting General Manager in the same county. Each defendant corporation has, as already indicated, its main office and is conducting its business in that county.

The Copper Company, the New Jersey corporation, appeared for the special and sole purpose of objecting to the jurisdiction of the Circuit Court. The British corporation appeared for the special purpose only of entering a motion to dismiss the bill for want of jurisdiction as to it, as well as for want of proper parties. The court, speaking by Judge Sanford, who delivered a well-considered opinion in the case, sustained the motion of the Tennessee Copper Company, and dismissed the bill as to it. The motion of the British company was overruled, the court holding that it had jurisdiction over the alien corporation. *Ladew* v. *Tennessee Copper Co.*, 179 Fed. Rep. 245. There was no appeal by the latter corporation.

The present appeal was taken only from that part of the decree dismissing the bill as to the New Jersey corporation.

The plaintiffs, we have seen, are citizens of New York and West Virginia, while the Tennessee Copper Company is a corporation of New Jersey. But under the statutes regulating the jurisdiction of the Circuit Courts of the United States, diversity of citizenship—nothing more appearing—will not give authority to Circuit Courts of the United States to render a judgment *in personam* where, as here, neither the plaintiffs nor the defendants are inhabitants of the district in which the suit was brought, and where the defendant appears specially and objects to jurisdiction being exercised over it. The defendant corporation, not an inhabitant of the district where suit is brought, cannot be compelled against its will to submit to such jurisdiction for the purposes merely of a personal judgment. 18 Stat. 470, March 3, 1875, § 1, c. 137, as amended and corrected in 1887 and 1888; March 3, 1887, c. 373, 24 Stat. 552; August 13, 1888, c. 866, 25 Stat. 433; *Macon Grocery Co.* v. *Atlantic Coast Line*, 215 U. S. 501, 508, 510, *and authorities there cited.*

The plaintiffs insist, however, that jurisdiction can be sustained by § 8 of the act of March 3d, 1875, determining the jurisdiction of the Circuit Courts of the United States. 18 Stat. 470, c. 137. The first section of that act, as amended by the above act of 1888, 25 Stat. 433, correcting the enrollment of the act of March 3d, 1887 (24 Stat. 552, c. 373), provides that a suit founded only on the fact of the diversity of citizenship between the parties, shall be brought only in the district of the residence of either the plaintiff or the defendant. But the plaintiffs contend that that section is not to be interpreted apart from the other sections of the same act. Section 8 has relation to the first section and contains provisions that refer to an exceptional class of cases.

The two sections relate to the same general subject, and must be regarded as embodying a scheme of jurisdiction. Considered together, they mean that, if jurisdiction is founded only on diversity of citizenship, the Circuit Court may, without its process being personally served on the defendant, within its jurisdiction, exert the jurisdiction given by the eighth section in the particular cases and *for the special purposes therein specified*—its power in such cases being of course restricted as in that section prescribed. Such is the argument of the plaintiffs.

The eighth section of the act of 1875 provides: "That when in any suit commenced in any circuit court of the United States, to enforce any legal or equitable lien upon, or *claim to*, or to remove any incumbrance or lien or cloud upon the title to, real or personal property *within the district where such suit is brought*, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit

in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect *only* the property which shall have been the subject of the suit *and under the jurisdiction of the court therein, within such district.* . . ."

Substantially, the contentions of plaintiffs are that the mode in which the defendant uses its real property in Tennessee, within the jurisdiction of the Circuit Court, creates a nuisance injuriously affecting their property near by in the State of Georgia; that, according to the settled principles of law, they are entitled to have the defendant corporation restrained from so using its Tennessee property as to injure their property in Georgia; and that the right to such protection, against the effects of that nuisance, as maintained by the defendant in Tennessee, should, within the fair meaning of the act of 1875, be deemed a "*claim to* . . . real property . . . within the district where such suit is brought"—such property, it is alleged, being so used in Tennessee as to create a nuisance, causing injury to the plaintiffs' property in Georgia.

Manifestly, unless the plaintiffs can sustain this proposition and bring their case within the eighth section of the act of 1875, there is no ground whatever to maintain the jurisdiction of the Circuit Court as to the defendant corporation; certainly not, as we have said, for the purposes of a personal judgment against the defendant company, since neither the plaintiffs nor the defendant are inhabitants of the district in which the suit was brought, and the defendant corporation refuses to voluntarily appear and submit to the jurisdiction of the court.

We are of opinion that under no reasonable interpretation of the eighth section can the plaintiffs' case be held to belong to the class of exceptional cases mentioned in

that section. In no just sense can their cause of action be said to constitute "*a claim to*" real property in the district. They cannot be regarded as having a "claim to" the leased land or premises on which the alleged nuisance is maintained. It may be that what the defendant is charged with doing creates a nuisance. It may also be that the defendant company wrongfully uses and has used its property in Tennessee in such way as to seriously injure the property of plaintiffs, near by in Georgia, and that plaintiffs are legally entitled by some mode of proceeding in some court to have the alleged nuisance abated, and their property in Georgia protected in the manner asked by them. But it does not follow that they can invoke the authority of the Circuit Court of the United States for the protection of their property against the defendant's acts. The jurisdiction of the Circuit Courts is determined by acts of Congress enacted in pursuance of the Constitution. Apart from the powers that are inherent in a judicial tribunal, after such tribunal has been lawfully created, the Circuit Courts can exercise no jurisdiction not conferred upon them by legislative enactment. It is quite sufficient now to say, without discussion, that it would be a most violent construction of the eighth section of the act of 1875 to hold that the right to have abated the nuisance in question arising from the use in Tennessee of defendant's property, because of the injurious effects upon plaintiffs' real property in Georgia, creates, in the meaning of the statute, a "claim to" real property within the district where the suit is brought. There is absolutely no foundation for such a position. We do not mean to say that Congress, in cases of controversies between citizens of different States, might not so enlarge the scope of the statute regulating the jurisdiction of the Federal courts as to enable the Circuit Court, sitting in Tennessee, to suppress the nuisance in question. Upon that question

we have no occasion at this time to express an opinion. Still less do we say that the plaintiffs have not an efficient remedy in some court either against the defendant corporation, or against the several individuals who, under its sanction, or by its authority, are maintaining in Tennessee the nuisance complained of. We only mean to say—and cannot properly go further in this case—that the statute in question does not cover this particular case, and that the United States Circuit Court, sitting in Tennessee—the New Jersey company refusing to voluntarily appear in the suit as a defendant—is without jurisdiction to give the plaintiffs, citizens of New York and West Virginia, the particular relief asked against that corporation.

The bill was properly dismissed for want of jurisdiction in the Circuit Court and the decree below is

Affirmed.